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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

PASCUAL GUANA-SANCHEZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App A, *infra*, pp. 1a–13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 14a) was entered on July 18, 1973. A timely petition for rehearing was denied on September 25, 1973 (App. C, *infra*, p. 15a). On October 17, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to November 23,

1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant has standing to obtain suppression of the testimony of witnesses who, after having been unlawfully arrested while passengers in his automobile, gave statements revealing the commission of a crime by the defendant and confirming their identity as potential witnesses against him.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

8 U.S.C. 1324(a) provides in pertinent part:

> Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> * * * * *
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> * * * * *
>
> any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States * * * shall be guilty of a felony * * *.

STATEMENT

Respondent Pascual Guana-Sanchez was charged in a one-count indictment returned in the United States District Court for the Northern District of Illinois with having knowingly and unlawfully transported three aliens into the United States, in violation of 8 U.S.C. 1324(a)(2). Respondent filed a pre-trial motion to suppress evidence and to dismiss the indictment, alleging that he and the passengers in his car had been illegally arrested and that the government's evidence depended upon the testimony of the passengers. After an evidentiary hearing, the district court granted the motion to suppress the future testimony of the three passengers (App. D, *infra*, pp. 16a–26a). The court of appeals affirmed, one judge dissenting (App. A, *infra*, pp. 1a–13a).

1. The relevant facts, as developed at the hearing on the motion to suppress and as set forth in the opinion of the court below, are as follows (*id.* at 1a–3a):

On November 17, 1971, at approximately 2:30 a.m., two local police officers in Villa Park, Illinois, approached respondent's station wagon, which was parked in a vacant lot. The headlights and interior light were shining, and respondent was in the driver's

seat, reading an Illinois road map. The officers noticed that the car also contained three male passengers, one of them asleep, and three shopping bags filled with "clothing or material." Upon inquiry of the driver and of police headquarters (by radio), the officers established that respondent possessed a valid driver's license, that the automobile was registered in his name, and that he was not "wanted by the police." The officers also learned, upon thereafter inquiring of the passengers, that they could not speak English and had no American identification; one had identification connecting him with the Mexican National Guard.

Their suspicions aroused, the police officers called their supervisor and, on his instruction, they ordered two of the passengers into their car and took them to the police station; respondent and the third passenger followed, at the officers' direction. The supervising sergeant at the station then telephoned an immigration official in Chicago, who spoke with respondent's passengers, then told the police that the passengers had admitted illegal entry into the United States. He directed the officers to detain respondent and the three passengers. On the following morning, the passengers were turned over to immigration officers. Respondent was subsequently indicted for having transported them illegally.

2. In June 1972, the district court granted respondent's pre-trial motion to suppress the testimony of the three aliens who had been present in respondent's automobile. The court found that, while the police officers' initial interrogation may have been based on "proper investigative suspicions" (App. D, *infra*, p. 19a), those suspicions became unjustified after the officers ascertained that respondent had a valid driver's license and was the owner of the station wagon. Accordingly, the court concluded, the further interrogation of the car's passengers and respondent's arrest were unlawful (*id.* at 19a, 23a), and the discovery of the passengers' status as participants in and witnesses to respondent's offense was the improper product of illegal police conduct (*id.* at 19a, 24a).

The district court asserted, moreover, that the future testimony of a witness is "verbal evidence" subject to exclusion on the same basis as unlawfully obtained physical evidence under the "fruit of the poisonous tree" doctrine (*id.* at 23a–24a). Believing that the government had not shown that the testimony of the witnesses could have been obtained independently of the illegal conduct, the court therefore unqualifiedly granted respondent's motion to suppress both the witnesses' testimony and any information obtained as a result of their interrogation (*id.* at 24a, 26a).

3. The government did not challenge in the court of appeals—and does not challenge here—the district court's conclusion that, when the police took respondent and his passengers to the police station, they made an unlawful arrest. The majority of the court of appeals agreed with that determination, although the court also concluded that the interrogation of

respondent and the passengers while they were in the car was proper (App. A, *infra*, pp. 3a–4a and n. 3).[1] The majority affirmed the district court's unqualified suppression of the passengers' testimony on the ground that evidence gained as a result of the arrests "was 'fruit of the poisonous tree'" (*id.* at 5a).

Judge Pell dissented, concluding, *inter alia*, that respondent had no standing to suppress the witnesses' testimony (an issue which the majority had not discussed), because he was not aggrieved by their detention and had no legal basis for asserting their right to be free from illegal seizure (*id.* at 12a–13a).[2]

[1] The district court treated the questioning of the passengers while they were in the car as being equivalent to a search of the car, even though the passengers were in plain view (App. D, *infra*, p. 26a), and held that that interrogation was improper (*id.* at 19a). For the purposes of the appeal only, the government assumed *arguendo* that the questioning of the passengers while in the car was a search as to which respondent had standing to object and that, if that search were illegal, the testimony of the witnesses could be suppressed as to a person having standing to object to the search. The government contended, however, that any such search was lawful. The court of appeals apparently agreed, for it treated the case as involving only a question of an unlawful arrest, not an unlawful search, and the court explicitly stated that "[w]hen the arrest was made" the interrogation of the passengers while inside the car had already occurred (App. A, *infra*, p. 4a, n. 3).

We do not believe that, properly analyzed, this case presents in fact any question concerning a search. The officers did not enter the car, the passengers were in plain view, and respondent had no property right or other legally protected interest in their continued presence in his car. The government's concession below for the sake of argument concerning the "search" issue, noted by the court of appeals (*id.* at 5a, n. 4), that respondent would have standing to seek suppression of the fruits of an unlawful search of his car, has no bearing on the question whether he is entitled to obtain suppression of the fruits of the unlawful arrest of the passengers.

REASONS FOR GRANTING THE WRIT

In holding that respondent had standing to secure the unqualified suppression of the future testimony of his passengers, the court of appeals has rendered a decision on an important question of constitutional law in conflict with the decisions of this Court and of other courts of appeals.

We note initially that, despite the fact that the majority opinion below focused its discussion on the legality of respondent's arrest, the testimony of the passengers could only be regarded as the "fruit" of the unlawful arrest of the passengers, and was not a fruit of respondent's arrest. Respondent himself made no incriminating statements, and his arrest yielded no information pointing to the commission of this offense or his passengers' status as witnesses thereto. Had repondent alone been arrested, there would plainly have been no "tainted fruit" stemming from his arrest. Conversely, if only the passengers, but not respondent, had been arrested, every piece of informa-

[2] Judge Pell also discussed at some length (*id.* at 6a–11a) the question whether, assuming that the knowledge that respondent had committed an offense and that the passengers were witnesses to the offense was the product of unlawful police action, it followed that the testimony of the witnesses as to events that transpired before the encounter with the police should properly be suppressed. He concluded that the proffer of living witnesses was a materially different proposition from the use of inanimate objects as evidence, and that the majority's decision constituted a departure from the general rule that the former is not automatically to be suppressed. (See n. 4, *infra*.)

tion would have been learned (as it was), yet there would obviously have been no relationship between their statements or testimony and any unlawful arrest of respondent. The fact that both respondent and the passengers happened to be arrested at the same time and under similar circumstances does not in any way make the statements or testimony of the passengers the "fruit" of respondent's arrest.

Inherent in the court of appeals' affirmance of the suppression order, therefore, is a determination that respondent may be permitted to obtain exclusion of evidence derived from the arrest of his passengers. Evaluation of the correctness of this decision turns upon the answers to two questions: Did the illegal police conduct leading to knowledge of respondent's commission of the offense and the passengers' status as witnesses thereto (concededly the product of the illegal arrest and detention of the passengers and demonstrably not the product of any illegal arrest of respondent) violate any rights of respondent? Is there some reason why the general standing requirement in Fourth Amendment cases should not be applied or should be altered in the circumstances of this case?

As a general proposition, it is well recognized that the rights protected by the exclusionary rule are personal ones, enforceable only by the individual against whom the unlawful conduct was directed or whose rights were infringed thereby. Accordingly, one whose sole grievance is that evidence obtained by violation of another's rights is sought to be used against him is denied standing to assert vicariously the claim of illegality. See, *e.g.*, *Alderman* v. *United States*, 394 U.S. 165, 171–176; *Simmons* v. *United States*, 390 U.S. 377, 389; *Jones* v. *United States*, 362 U.S. 257, 261. This rule limiting standing to invoke the exclusionary rule to persons whose rights were infringed by the unlawful police actions in question has been applied in a variety of contexts, including cases where evidence was assertedly the tainted fruit of an illegal wiretap (*Alderman* v. *United States*, *supra*), of other types of unlawful searches (*Brown* v. *United States*, 411 U.S. 223, 227–230; *Wong Sun* v. *United States*, 371 U.S. 471, 491–492), and of other allegedly unlawful activity. (*E.g.*, *Zacoogian* v. *United States*, 367 F. 2d 959, 962 (C.A. 1).

In the instant case, the court of appeals simply adverted to the illegality of the arrests, without any analysis of the relationship between that illegality and the obtaining of prosecutorially useful information. The tainted information, however, did not flow from the arrests themselves, but from statements made by one of the passengers to an immigration official during the ensuing illegal detention. In permitting the respondent to challenge the government's enjoyment of the fruit of the immigration officer's interrogation (the knowledge that respondent had committed a crime and that the passengers were witnesses to it), the decision below conflicts with decisions of other courts of appeals denying a defendant standing to complain that information used against him was obtained from another person in a manner that violated the Fifth Amendment rights of that person (*e.g.*, *United States* v. *Bryson*, 419 F.2d 695, 698–699, 700, n. 24 (C.A.D.C.) (violation of *Miranda* rules); *United*

States v. *Goodwin*, 470 F.2d 893, 903 (C.A. 5) (testimony compelled in bankruptcy hearing)) or was obtained during a period of unlawful detention of that person. *E.g.*, *United States* v. *Howell*, 470 F.2d 1064, 1066–1067 (C.A. 9) (detention in violation of Fed. R. Crim. P. 5(a)).

The foregoing cases differ from the instant case in that they did not involve unlawful arrests. To the extent that the illegality of the arrests is considered material—and we do not believe it creates an analytically significant distinction—the decision below conflicts with decisions of other courts of appeals holding that a defendant does not have standing to seek the exclusion of evidence derived from a search incident to the unlawful arrest of another. *E.g.*, *United States* v. *Humphrey*, 409 F. 2d 1055, 1058 (C.A. 10); *cf.* *United States* v. *Brown*, 425 F. 2d 1172, 1174 (C.A. 9); *United States* v. *Hamilton*, 457 F. 2d 95, 100, n. 12 (C.A. 3). For example, in *Humphrey* the court held that the defendant had no standing to challenge the legality of the arrest and incidental search of the driver of the car in which the defendant was a passenger (the converse of the situation here but the same in legal principle).

The question remains whether there are present in this case any factors that would take it outside the operation of the principles of standing discussed above. This, we submit, would require a showing that the arrest of the passengers and their subsequent detention and questioning infringed in some material respect upon respondent's rights. The majority below

did not address this question; the dissent did and, in our view, convincingly disposed of the notion that the aliens' status as passengers in respondent's car at the time of their arrest was a circumstance creating standing (App. A, *infra*, pp. 12a–13a):

> The fact that the passengers had been in the defendant's automobile should not, it appears to me, create some sort of vicarious standing. The defendant's transportation of the illegal immigrants should not be the basis of creating an immunity for him from harmful testimony. * * * He had no proprietary interest in their bodies—or minds.

Because the passengers were human beings and not property, and because the arrest of the passengers entailed no entry by the police into respondent's automobile, he should not be given standing to complain about their arrest or anything that ensued therefrom.

The court of appeals' unexplained departure from established principles of standing thus conflicts with decisions of other courts of appeals, reflects an unsound and undesirable principle of law, and injects serious confusion into the law of standing to invoke the exclusionary rule.[4]

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[4] Even if respondent were properly considered to have standing to challenge the use against him of testimony of the passengers or information provided by them, it does not follow that the exclusionary rule was properly applied in this case to bar their live testimony at trial with respect to events transpiring prior to the occurrence of any police illegality. Whether such testimony is properly excludable as a nonattenuated "fruit" of the initial illegality presents an important and difficult question, as to which we are in general agreement with the observations made in Judge Pell's dissent. We do not raise this issue

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1973.

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as a primary question presented because we believe that this case does not provide a suitable vehicle for analysis of the issue. Analysis of the propriety of such a novel application of the exclusionary rule would, it seems to us, require consideration of the relationship between the purposes of the rule, the nature of the interests invaded by the unlawful police conduct, the way in which the illegality taints the evidence, and the nature of the use to be made of the arguably tainted evidence. These considerations cannot readily be weighed in the abstract, and respondent's lack of standing here inevitably interferes with sound analysis—it being essential to include in the analytic equation a consideration of the nature of the wrong done the defendant and the manner in which it produced the testimony sought to be suppressed. Absent standing, there is no causal relationship to consider.

APPENDIX A

In the United States Court of Appeals
for the Seventh Circuit
September Term, 1972—January Session, 1973

No. 72-1784

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

PASCUAL GUANA-SANCHEZ, DEFENDANT-APPELLEE

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 72-CR-50

JAMES B. PARSONS, *Judge*
Argued January 23, 1973—Decided July 18, 1973

Before KILEY, FAIRCHILD and PELL, *Circuit Judges.*

KILEY, *Circuit Judge.* Defendant, Sanchez, was charged in a one count indictment with knowingly and unlawfully transporting aliens within the United States in violation of 8 U.S.C. § 1324(a)(2). After an evidentiary hearing the district court granted Sanchez's motion to suppress evidence unlawfully seized by police. The government has appealed. We affirm.

On November 17, 1971, at approximately 2:30 a.m., Villa Park, Illinois, police officers Tenuto and Hall observed Sanchez sitting in a station wagon, about 150 to 200 feet away, in a vacant lot, with headlights and interior light shining. When the officers approached

the car. Sanchez was in the driver's seat and was reading an Illinois road map. At this time the officers observed three other males also in the car, one of them sleeping and three shopping bags filled with "clothing or material" in the rear of the car.

The officers then began an inquiry which disclosed that Sanchez had a valid driver's license, that his passengers were probably Mexican, and led to the further disclosure that the car was registered in Sanchez's name and that he was not "wanted by the police." The police then radioed for their supervising sergeant. Upon the sergeant's arrival and, at his direction, two of Sanchez's passengers were directed to enter a police car and were driven to a police station. Sanchez was "invited" to follow with the third passenger.

At the police station the sergeant spoke on the telephone with Captain Partin, a Chicago immigration official, who then spoke to Sanchez's passengers. Partin directed the police to detain Sanchez and his passengers, whom Partin told the police had admitted illegal entry into the United States. The four men were locked up overnight, were picked up by immigration authorities the next morning, and Sanchez was subsequently indicted. The proceeding before us followed.

Three steps in time can be delineated from the facts before us: (1) the original interrogation ending with the determination of validity of Sanchez's driver's license and his ownership of the car; (2) the period beginning with the return to Sanchez of his license and of the restraint upon his movement thereafter; and, (3) the period beginning with the trip to the police station.

The district judge conducted an evidentiary hearing at which the parties stipulated that no arrest or search warrant had issued. Officer Tenuto was the only government witness.[1] After the hearing, the district judge read his findings of fact and conclusions of law[2] in which he decided that the police officers had a reasonable suspicion justifying their interrogation, in the first step of the police activity, but that there was no probable cause to justify their activity thereafter.

When the sergeant appeared at Sanchez's car and appraised the situation, he said to officers Tenuto and Hall, "[l]et's bring them into the station and check them out and see who they are, if they are wanted by anybody." Two of the passengers were then ordered out of Sanchez's car and into a police car for the trip to the police station. Under the circumstances we take officer Tenuto's testimony that Sanchez was "invited" to follow to mean that he was ordered. Officer Tenuto testified that "[w]e did not have anything to bring them into the station for." The district judge properly noted that "Sanchez was taken into custody by the * * * officers for investigation * * * [and] [t]here is no crime of 'investigation.'" See *Davis* v. *Mississippi*, 394 U.S. 721, 726–27 (1969); *United States* v. *Foust*, 461 F. 2d 328, 330 (7th Cir. 1972). The police had no greater knowledge when they arrested Sanchez than they had after the end of the initial intrusion on reasonable suspicion. On the contrary, they had additional knowledge that he was most probably

[1] The government stated that officer Hall's testimony would be substantially similar to Tenuto's.

[2] The written memorandum from which he read is not in the record.

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innocent of any connection with crime.[3] At best they had "hunches" of criminality but that is not sufficient. *Terry* v. *Ohio*, 392 U.S. 1, 21–22 (1967).

There was no showing by the evidence "* * * that the exigencies of the situation" made the warrantless arrest "imperative." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454–55 (1971). The police had the burden of justifying the arrest. *United States* v. *Burhannon*, 388 F. 2d 961, 962 (7th Cir. 1968). And the standards for warrantless arrests "are at least as stringent" as those applicable to a magistrate's assessment. *Whiteley* v. *Warden*, 401 U.S.. 560, 566 (1971). This record falls far short of the required showing.

The warrantless arrest must be judged as of the time it was made. It could not be aided by the post facto developments of immigration official Partin's statement to the police that Sanchez's passengers were probably illegal entrants into the United States, nor by reason of the warrantless search of Sanchez's car which produced a hand gun in the glove compartment. See *Henry* v. *United States*, 361 U.S. 93, 103 (1959).

The government's reliance upon this court's decision in *United States* v. *Chaidez-Castro*, 430 F. 2d 766 (7th Cir. 1970), and *United States* v. *Madril*, 445 F. 2d 827 (9th Cir. 1971), is misplaced. In *Chaidez-Castro* there

[3] When the arrest was made the police knew Sanchez owned the car and had a valid driver's license and they had no reason to believe that he was committing or was probably connected with an offense. The police had learned by observation before the arrest that Sanchez spoke, and his passengers responded in, a language the police "did not understand" but which was probably Spanish and that the passengers were probably Mexican or Puerto Rican. But the court properly noted that there is no crime in speaking Spanish or being Mexican or Puerto Rican. See *United States* v. *Mallides*, 473 F. 2d 859, 860 (9th Cir. 1973).

were, in support of the warrantless arrest, Texas license plates on the truck and extra Texas license plates on the floor of the cab, and "the most persuasive [fact] was the police officers' observation of a number of faces peering from the inside of a 'home-made' box on the back of the truck." In *Madril* the court sustained the warrantless arrest, where the initial stop was occasioned by a speeding violation and thereafter the driver was unable to produce proof of ownership as required by law. Moreover, there was an outstanding warrant for defendant which was discovered during the course of checking the status of the vehicle and its occupants.

We have considered, but need not pass upon, other points raised.

We conclude that the district court did not err in deciding that the arrest was unreasonable under the Fourth Amendment and that the evidence gained thereafter was "fruit of the poisonous tree." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963).[4]

AFFIRMED.

PELL, *Circuit Judge* (dissenting).

Being of the opinion that the passengers, witnesses to a crime, should not have been suppressed as witnesses, *i.e.*, in effect being made incompetent to testify to matters within their knowledge concerning criminal activity on the part of someone else, I respectfully dissent.

It is not entirely clear to me as to when the district court thought the illegal police activity commenced.

[4] The government concedes that the testimony of witnesses discovered during an illegal search can be suppressed as to a person having standing to object. We think the same is true in the event of an illegal arrest. See *United States* v. *Mallides*, *supra*, at p. 861.

The majority opinion of this court construes the district court opinion as holding that the police officers had a reasonable suspicion justifying the initial interrogation. I agree, and to the extent that the district court indicated otherwise it would seem clearly wrong. Four men were parked in a vacant lot in an industrial area at 2:30 in the morning in a Chicago suburb where recent burglaries had taken place. The defendant's story of looking for a friend's restaurant did not check out as all restaurants in the area had been closed for several hours. The officer who testified had had past experience with illegal immigrants who had been transported into this country by automobile. The area had small factories "looking for cheap labor." The passengers in the automobile spoke no English nor did they have any United States identification cards. One of the occupants had a card which appeared to be a Mexican Army card. Three shoppings bags of clothing were in the car.

On the basis of these facts, I would have some difficulty in faulting the police conduct. See *United States* v. *Catalano*, 450 F. 2d 985 (7th Cir. 1971). The police action was scarcely of the dragnet variety. However, this aspect of the case does not assume the significance that two other facets do.

The first of these is the extent to which the exclusionary rule should be extended. Putting the matter another way, how remote a branch of a poisoned tree is still capable of bearing tainted fruit not subject to the plucking for testimonial use? I am here, of course, assuming arguendo that the police conduct was such as to bring into play the exclusionary rule as to any tangible item found in the automobile or any statement that might have been made by any of the persons in the automobile. Here, however, the effect of the district court ruling is to make witnesses to a crime in-

competent to testify. "The rules which disqualify witnesses who have knowledge of relevant facts and mental capacity to convey that knowledge are serious obstacles to the ascertainment of truth. For a century the course of legal evolution has been in the direction of sweeping away these obstructions." McCORMICK ON EVIDENCE § 71, at 150 (1954).

A reversal of direction in this well developed trend of the law can obviously be dictated by policy considerations. I fail to find, however, such a countervailing policy here. I am not unmindful that respectable authority [1] has held that the exclusionary rule should be carried to the present position and that the Government has conceded that if a defendant has standing, testimony of witnesses discovered during an illegal search can be excluded. Nevertheless, the rationale of the exclusionary rule in my opinion does not call for its extension to the point of excluding altogether an otherwise competent witness. In so stating, I do not suggest that the weight of his testimony could not be challenged by showing the impact of the method of discovery on the likelihood of the witness's telling the truth, e.g., if he were under compulsion to testify because of awareness that his own involvement in a crime was known by virtue of a Fourth Amendment violation.

We do not here have a *Wong Sun* [2] situation in which the excluded evidence, a verbal statement, is deemed to be equated with "physical, tangible materials obtained either during or as a direct result of an unlawful invasion." We here have witnesses who were in plain view of officers who, at the time, were

[1] See, for example, *Smith* v. *United States*, 344 F. 2d 545 (D.C. Cir. 1965); *United States* v. *Tane*, 329 F. 2d 848 (2d Cir. 1964).
[2] *Wong Sun* v. *United States*, 371 U.S. 471, 484–6 (1963).

engaged in their "community caretaking functions." *Cady* v. *Dombrowski*, — U.S. —, 41 U.S.L.W. 4995, 4996–99 (June 21, 1973). Essentially, it appears to me, we are dealing with a question of the extent to which the exclusionary rule might reasonably be expected to have a deterrent effect on proscribed police conduct. We know that the rule is not absolute, one to be applied in all circumstances. Thus, the Supreme Court in *Harris* v. *New York*, 401 U.S. 222 (1971), held that a statement wich was inadmissible against a defendant in the prosecution's case in chief because of a *Miranda* violation might be used for impeachment purposes. While we here have a proposed use of witnesses in the affirmative case of the prosecution, I cannot conceive that the rationale of deterrence of police misconduct will be furthered by this extension of the rule. The "speculative possibility that impermissible police conduct will be encouraged" (401 U.S. at 225) by making witnesses competent in the present situation appears so remote to me that a sound public policy would draw the exclusionary situation short of a mandatory incompetency.

Indeed, in those cases holding that the witness himself may be the product of the poisoned tree and therefore not free to testify as to his knowledge of the crime, the exclusion is not absolute and recognition has been given to what might be called an "attenuation test." *Smith* v. *United States*, *supra*, 344 F. 2d at 547. I have some conceptual difficulty in determining how an exclusionary rule designed to control police behavior can be applied on a case-by-case basis as *Smith* would have us do. I am certain that police officers would have an even greater difficulty in determining whether a possible witness's testimony was attenuated from illegality.

While *Smith* did not purport to overrule an earlier case of the same circuit, *Smith* and *Bowden* v. *United States*, 324 F. 2d 879 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 954 (1964), nevertheless, the earlier case in which the court spoke through then Judge Burger is worthy of extensive quotation as illustrating the concepts which I believe should be applicable in the present situation.

> Courts have gone a long way in suppressing evidence but no case as yet has held that a jury should be denied the testimony of an eyewitness to a crime because of the circumstances in which his existence and identity was learned. However, in our view, the relationship between the inadmissible confessions and Holman's testimony in the District Court months later is so attenuated that there is no rational basis for excluding it. No case has been cited to us in which the testimony of an eyewitness or factual witness has been excluded because his identity was discovered as a result of disclosures made by an accused during detention violative of Rule 5(a) Fed R. Crim. P. * * *
>
> The District Judge correctly read this court's holding in *Killough* v. *United States*, 114 U.S. App. D.C. 305, 315 F. 2d 241 (1962), as not requiring the exclusion of Holman's testimony. Neither the Killough holding, the Mallory holding nor any other case would warrant excluding Holman's testimony. The fact that the source of evidence is "tainted" by violation of constitutional or statutory provisions has not precluded the use of that evidence in every circumstance. * * *
>
> Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with the confessions. But a witness is not an inanimate ob-

> ject which like contraband narcotics, a pistol or stolen goods, "speak for themselves." The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence. 324 F. 2d at 881–2. [Footnotes omitted.]

It appears to me that in the intervening ten years the exclusionary rule has been expanded so as mechanically to equate the proffer of a living witness with the proffer of inanimate evidentiary objects illegally seized.

What appears to me to be a recession from the underlying principles announced in *Smith* and *Bowden* followed within less than a year in *McLindon* v. *United States*, 329 F. 2d 238, 241 n. 2 (D.C. Cir. 1964), in which the court stated it did not read *Smith* and *Bowden* as holding that testimony may never be excluded. However, in so stating, reliance was placed on cases which forbade testimony as to visual and aural observations during an unlawful search. This, it appears to me, is no support for the present matter; obviously, if seized heroin is to be excluded, a witness who was present at the seizure should not be permitted to testify to the nature and identity of the seized material. The equation is clear and all that has to be justified is that the material itself is subject to suppression.

I note that the *McLindon* court did not mechanically equate the proffer of a witness whose knowledge was independent of the improper conduct with the proffer of illegally seized, inanimate evidentiary objects. Instead, in remanding for a hearing, it laid down a case-by-case standard as follows:

> In each case the court must determine how great a part the particular manifestation of "individual human personality" played in the ultimate receipt of the testimony in question. Indications in the record that mere knowledge of the witness' identity would not inevitably guarantee that his testimony would be favorable to the prosecution; that the witness might eventually have voluntarily gone to the police even without their knowing his identity; that his testimony has remained unchanged from the start—all are relevant factors to be considered in determining the final outcome. 329 F. 2d at 241 n. 2.

I find no consideration by the district court in the present case of any such factors. Rather, the rule was mechanically applied to exclude everything connected with the claimed improper conduct in a broad sweep of the broom which somehow is supposed to restrain undesirable constabulary conduct.

The rule as so expanded makes appropriate another quotation from *Smith* and *Bowden*, *supra* at 882:

> Mr. Justice Jackson would appear to have had something like this in mind when he expressed unwillingness to debase constitutional doctrine "by making of them mere technical loopholes for the escape of the guilty. The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law." *Stein* v. *People of State of New York*, 346

U.S. 156, 196, 73 S. Ct. 1077, 1098, 97 L. Ed. 1522 (1953).

Of equal if not greater importance is the second significant facet of this case, that of standing. Of course, any indicted defendant is aggrieved by testimony which reflects on his guilt. Standing is something more than this human reaction. In *Tane*, the Second Circuit, which did apply the exclusionary rule to a witness, first considered the question of standing and determined that there was standing. In *Smith*, however, there seems to have been no consideration of the question. Whatever doubt there may have been as to the necessity of stand would seem to have been put to rest by the Supreme Court in *Alderman* v. *United States*, 394 U.S. 165, 171-2 (1969), where the Court stated:

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.

The passengers in defendant's automobile, all in plain view, were discovered initially during the course of what seems clearly to have been a valid investigatory stop. I cannot find any standing on the part of the defendant arising from the transportation of the passengers to the police station. They may have been aggrieved in a standing sense but it is not they who are attempting to assert a right of suppression. The fact that the passengers had been in the defendant's automobile should not, it appears to me, create some sort of vicarious standing. The defendant's transportation of the illegal immigrants should not be the basis of creating an immunity for him from harmful testi-

mony. Cf. *United States* v. *Chaidez-Castro*, 430 F. 2d 766 (7th Cir. 1970). He had no proprietary interest in their bodies—or minds. I would vacate the order of suppression, reverse, and remand for a trial.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals for
the Seventh Circuit

Chicago, Illinois 60604

July 18, 1973

Before Hon. ROGER J. KILEY, Circuit Judge; Hon. THOMAS E. FAIRCHILD, Circuit Judge; Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, *v.* PASCUAL GUANA-SANCHEZ, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the United States Court of Appeals
For the Seventh Circuit

No. 72-1784

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

PASCUAL GUANA-SANCHEZ, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
(72 CR 50)

Before Hon. ROGER J. KILEY, *Circuit Judge;* Hon. THOMAS E. FAIRCHILD, *Circuit Judge;* and Hon. WILBUR F. PELL, JR., *Circuit Judge.*

(September 25, 1973)

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 72 CR 50

UNITED STATES OF AMERICA, PLAINTIFF

v.

PASCUAL GUANA-SANCHEZ, DEFENDANT

Transcript of Proceedings

had in the above-entitled cause before the Hon. JAMES B. PARSONS, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on June 8, 1972, at 11:00 o'clock, a.m.

Present: Mr. MICHAEL D. STEVENSON, Assistant United States Attorney, On behalf of the Government; Mr. JOSEPH BEELER, On behalf of the Defendant.

* * * * *

The COURT: This is 72 CR 50, *U.S.* vs. *Pascual Guana-Sanchez*. This is the memorandum opinion and order.

This matter is before me today for a ruling on the motion to suppress and dismiss filed by the defendant, Pascual Guana-Sanchez. On November 17, 1971 at 2:30 a.m. Mr. Sanchez and three passengers in his automobile were taken into custody by two Villa Park police officers who had observed Mr. Sanchez' station wagon parked on a vacant lot located on the northeast corner of the intersection of North and Addison Roads in Villa Park.

The officers, upon observation of Mr. Sanchez' automobile, radioed a message to the police station that they were going to the "aid of a motorist in distress," gave the dispatcher the Illinois license number of the station wagon, and drove to the other side of the intersection.

The officers then questioned Mr. Sanchez as to whether he was having trouble and Mr. Sanchez replied that he was looking for a restaurant on North Avenue owned by a friend, and he displayed a match book advertising this restaurant. It was in an adjacent town.

One of the officers checked in with the police dispatcher and learned that the restaurant was not open.

The officer returned with the above information and then one of the officers requested that Mr. Sanchez produce his driver's license. This license appeared to be an entirely valid Illinois driver's license.

Furthermore, his name and address on the driver's license corresponded to the information the officer had previously received as a result of his radio check of the license plate of the car.

This radio report had been requested by the officers at 2:33 a.m. and was received by them at 2:35 a.m. It verified not only the name and addresses of the owner but also that the car was not stolen or wanted in connection with any crime.

The officer having completed his inspection of the driver's license, returned the license to Mr. Sanchez. Thus, at this point there were no grounds stated to infer that a crime was being committed, had been committed or was about to be committed. Nevertheless, one of the state officers proceeded to request identification from the three passengers in the car.

Two of the passengers were not able to produce any identification, and the third passenger produced a card

written in a foreign language, and handed it to one of the officers, who saw the word "Mexico" and other words which he made out to indicate an affiliation with the Mexican National Guard.

Consequently, the officers radioed their sergeant, who was in another Villa Park police car, and he drove to the scene. Mr. Sanchez was asked to follow a patrol car to the police station. With this he complied.

After they entered the station Mr. Sanchez' car later then was searched without his consent being obtained.

We need not here go into the search or the fruits, as the government agrees that such discussion would merely serve to create an unnecessary issue for the Court to consider.

Sometime thereafter one of the local officers telephoned the Immigration and Naturalization Service in Chicago. The Immigration officer on the phone spoke with the three passengers and then informed Sargeant Weiser of the Villa Park police that the passengers were aliens illegally within the United States. He requested that they and Mr. Sanchez be held until officers of the Immigration & Naturalization Service could come to Villa Park the next morning, later.

Mr. Sanchez was then placed in a detention cell. The passengers were placed in a different detention cell.

I find that Mr. Sanchez and the three passengers of his automobile were seized by the Villa Park, Illinois police officers without a warrant for arrest or without a warrant for search, thus it became the burden of the prosecution to demonstrate probable cause for the police intrusion.

I quoted *United States* vs. *Buchanon*, 388 Fed 2d 961 at 962, a Seventh Circuit Decision in 1968.

The defendant contends, and this Court agrees, that the government did not justify the police conduct and that, "Under our system suspicion is not enough for an officer to lay hands on a citizen of the United States. It is better so, the Fourth Amendment teaches, that the guilty sometimes go free than the citizens be subject to easy arrest." *Henry* vs. *U.S.*, 361 U.S. 98 at 104, a 1959 decision.

Mr. Sanchez was taken into custody by the Villa Park police officers "for investigation." There is no crime called "investigation."

I, however, do not believe that the police had a legitimate reason for detaining Mr. Sanchez, his automobile or his passengers. The officers had viewed the car and had seen no evidence of a crime.

They had ascertained from police headquarters that the car was not stolen nor wanted and that it was owned locally. They determined that the driver of the car had a valid operator's license and was the owner of the vehicle.

Whatever proper investigative suspicions they may have had earlier were dispelled at this point, and thus it was unjustified to hold the vehicle longer, or its occupants, or to interrogate the passengers.

I find that Mr. Sanchez' arrest was made for "investigation" at a time when the officers should have been satisfied that Mr. Sanchez had committed no crime needing "investigation."

Illinois law provides that a police officer may arrest a person when "he has reasonable grounds to believe that the person is committing an offense against the laws of the State of Illinois or has committed an

offense." Illinois Revised Statutes, Chapter 38, Section 107-2(c).

In addition, Illinois law provides for a temporary questioning; we commonly refer to it as a search—what do you call it? Stop and search.

But without authorizing arrest this is possible under Illinois Statute, Chapter 38, Section 107-14. That provision states, and let me quote from it:

> A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing or is about to commit a crime, or has committed an offense as defined in Section 102-15 of the Code, and may demand the name and address of the person and an explanation of his actions. Such detention and temporary questioning will be conducted in the vicinity of the person where he is stopped.

The only formal arrest authorized by the provision is one for unlawful possession of a weapon discovered as a result of a reasonable preventative frisk conducted for the safety of the questioning officer. This is Illinois Revised Statutes, Chapter 38, Section 108-1.01.

There was no preventative search here under the circumstances at the location of the car. In sum, Illinois does not authorize arrest for "investigation," and, moreover, I find that Illinois law forbids even questioning of persons under such instant circumstances as found in this case after both Mr. Sanchez' license plates and his operator's license had been cleared.

Illinois police officers are not vested by Illinois law with a roving commission to detain any or all persons in order to demand satisfactory proof of identity

from them, and to haul them and their companions to a police station upon failure to produce the requested identification, and even if they were so vested by Illinois law, such a grant would be a violation of the Fourth Amendment of the Constitution of the United States.

In order to read the Illinois Statute as constitutional, I must read this requirement in it. Therefore the—wherefore, the government urges me to consider *U.S.* vs. *Chaidez-Castro*, 430 Fed 2d 766, a Seventh Circuit case of 1970 as authority for the police conduct in this case, and maintains that *United States* vs. *Chaidez-Castro* clearly controls the issue in the present case.

I find that the case is distinguishable from *U.S.* vs. *Chaidez-Castro* on a number of points.

That case held that there was probable cause for search due to a combination of the following factors: The police found a truck blocking a Chicago street; the truck had an unusual appearance and bore an apparently home-made box, and therein the police observed human faces peering out the windows of the box. The truck bore Texas license plates. There were extra license plates in the cab of the truck, and there had been police radio reports of illegal Mexican immigrants in which—of which the police were before the approached the vehicle aware. [Sic]

In the instant case there were no such grounds for any suspicion on the part of the Villa Park police officers; indeed, the officers had no such suspicions and originally had gone to Mr. Sanchez' station wagon to "aid a motorist in distress."

Another issue that must be disposed of in the instant case is whether Illinois law provides that local police officers may arrest for offenses which are exclusively federal offenses and are not state or local offenses.

I find that the arrest authority bestowed on Illinois enforcement officers extends only to "offenses" which specifically are defined as "a violation of any penal statute of this state." Illinois Revised Statutes, Chapter 38, Section 102–15.

In short, Illinois police officers, unlike those of many other states, do not have enforcement duties or powers in connection with non-Illinois crimes.

I also find that the federal statute in question, Title 8, United States Code, Section 1324(b), upon which the government relies, does not provide that state and local law authorities have enforcement—authorizes enforcement officers to arrest for exclusively federal crimes in the absence of a state law accepting the authorization.

There is no authority on the part of Illinois police officers or officers of the City of Chicago to stand over the shoulder of a person making out his income tax return and, knowing that he is falsifying the return, and watch him then proceed to a mail box and mail it in to the Internal Revenue Service, and thereupon arrest him for a federal crime.

The statute cannot be intended to impose an authority on state law enforcement officers which the state itself deliberately chooses to withhold from its own officers. Other states have accepted this authority but the state of Illinois has not.

It is intended to confer in Illinois arrest authority on Illinois officers only when Illinois law accepts the federal authorization. Here no such acception has been made.

The design of the United States Immigration and Naturalization law contemplates enforcement of that law by a designated federal agency, expert in that exceptionally difficult field, hence, the only general arrest authority for violation of the law is conferred

upon officers and employees of the Immigration and Naturalization Service, I cite 18 United States Code, Section 1357(a)(2).

Thus, I must reiterate that the statute, 8 U.S. Code, 1324, which prohibits the bringing in of certain aliens, cannot be intended to impose an authority on state or city law enforcement officers in the State of Illinois, which itself has deliberately chosen to withhold that authority from its own officers.

This Court has found that the arrest and search of Mr. Sanchez by the Villa Park police were illegal. The next issue I must decide is whether the information obtained from this illegal arrest should have been excluded from use as evidence—or should be excluded, at the trial of this case.

The purpose of the federal exclusionary rule is to protect the rights guaranteed by the Fourth Amendment, to deter illegal police conduct by denying admission into evidence of the matters obtained at the depravation of the rights of the people to the contrary notwithstanding.

The question of what evidence is to be excluded was discussed by the Supreme Court in *Wong Sun vs. the U.S.* at 371 United States Reports 471, 487–488, in 1963.

In effect that case states that the court should exclude all evidence proximately derived from the illegal police conduct not "so attenuated as to dissipate the taint," unless the government can show that the evidence could have been obtained from an independent source sufficiently distinguishable to be purged of the primary taint.

I am speaking of the doctrine of the poison—the fruit of the poison tree. The exclusionary rule applies to verbal evidence equally with physical evidence.

Wong Sun vs. *United States*, 371 U.S. Reports, 471, 487–488, 1963.

Courts exclude the testimony of a witness when the witness has been found as a result of illegal police conduct. *Smith* vs. *United States*, 344 Fed. 2d 545, District of Columbia Court of Appeals, 1965; *U.S.* vs. *Alston*, 311 F. Supp. 296, District of Columbia, 1970; *U.S.* vs. *Tane*, 329 F. 2d 848, a Second Circuit Decision in 1964.

The foregoing federal cases involve the discovery of witnesses at some point on a casual chain leading from illegal police conduct.

In the case at bar there is no attenuating circumstance whatsoever. The witnesses whose testimonys are sought to be suppressed were discovered not merely as a result of illegal police conduct but in the course of that illegal conduct. Those courts which have considered the problem of a witness discovered during an illegal search, seizure, arrest or detention have been uniform throughout in excluding the witnesses' testimony absent a showing of independent source of access to the witness. *People* vs. *Michaelson*, 59 Calif. Reports, 2d, 448; *Abbott* vs. *United States*, 138 Atlantic Reports, 2d, 485; a District of Columbia case, Municipal Court of the District of Columbia, of course, *People* vs. *Alba*, 2 D 11, 2d, 317, 118 N.E. 2d 277; *State* vs. *Rogers*, 27 Ohio Ap 2d, 105, 198 N.E. 2d 796.

The government has not shown that the testimony of the passengers found in Sanchez' automobile could have been obtained independently of the events that transpired in Villa Park on Nov. 17, 1971, when, without probable cause, Mr. Sanchez was taken into custody.

I have found illegal police behavior here; I must also exclude, therefore, the evidence obtained as a

result therefrom or proximately flowing from these events, including the identification of the passengers and any evidence obtained through the use of that information.

I should like to discuss one other matter. Villa Park authorities apparently regard as naturally suspect and detain persons found in that city at night, unless they provide identification that the police find satisfactory.

Villa Park practices, as they exist in many of the other suburban cities around Chicago, are similar to that of the Euclid, Ohio police practice of arresting all persons found abroad at night in Euclid, Ohio, who do not give a satisfactory account of themselves. This constitutes a police state, which the United States Constitution and the Supreme Court have been careful to try to prevent occurring here in the United States. That practice is illegal, even though authorized by ordinance. *Palmer* vs. *City of Euclid*, Ohio, 402 U.S. Reports 544, a recent decision of the United States in 1971.

I cannot help but wonder whether or not the fact that the defendant is of Mexican origin, though a citizen of the United States, was not simply and only instrumental in his arrest. Would the same treatment have been afforded four Caucasians in the same situation, with the same circumstances, particularly where the driver's papers were in order? I believe not.

* * * * *

In this case there was not only less than probable cause to arrest Mr. Sanchez, there was not even that quantum of suspicion which would justify a stop and search under Illinois law.

Accordingly, I grant the defendant's motion to suppress all of the evidence obtained as a result of his arrest and of his being taken into custody. I have

made these statements as my findings of fact and conclusions of law.

* * * * *

Mr. STEVENSON: Very well, Judge. One thing that your Honor did state in your opinion is not clear to me, and that is, does your Honor find that a search occurred of the defendant's car in which the passengers were——

The COURT: Interrogation of the passengers constituted a search of the car.

Mr. STEVENSON: Even though the passengers were in plain view?

The COURT: Yes.

* * * * *

Mr. STEVENSON: Yes, sir. Your decision prohibits any testimony from the passengers of the car, is that correct, Judge?

The COURT: Or any information obtained as a result of their interrogation.

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
AUG 13 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 73-820

UNITED STATES OF AMERICA,
Petitioner,

—v.—

PASCUAL GUANA-SANCHEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED
NOVEMBER 23, 1973
CERTIORARI GRANTED JUNE 17, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-820

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PASCUAL GUANA-SANCHEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
2- 1-72	Filed Indictment Bail: $2,000.00 O.R.
2-28-72	Appointment of Counsel.
3-17-72	Filed defendant's motion to suppress.
3-17-72	Filed defendant's motion to dismiss the indictment.
3-20-72	Defendant's motion to dismiss the indictment is denied.
5-12-72	Hearing on defendant's motion to suppress evidence held and concluded.
6- 8-72	Defendant's motion filed on March 17, 1972 to suppress evidence is allowed and it is so ordered.
6-23-72	Filed Notice of Appeal of U.S.A.
6-29-72	ENTER ORDER correcting order of June 8, 1972 causing the same to read as follows: Defendant's motion filed on March 17, 1972 to suppress evidence is allowed and it is so ordered. The courts ruling from the bench on defendant's motion to suppress evidence shall stand as findings of fact and conclusions of law herein. Motion of the government to incorporate into the record the government's written answer filed herein, is allowed.
8-30-72	Filed Notice (stipulation of record for appeal).
10-20-72	Appeal Brief of Appellant filed.
12-11-72	Appeal Brief of Appellee filed.
7-18-73	Judgment of Affirmance Entered.
7-18-73	Opinion of Court of Appeals filed.
7-18-73	Dissenting Opinion of Judge Pell filed.
7-25-73	ENTERED ORDER denying petition for rehearing en banc.
6-17-74	Petition for a Writ of Certiorari Granted.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

February, 1972

No. 72CR50
Violation: Title 8, United States Code,
Section 1324(a)(2)

The JANUARY 1972 GRAND JURY charges:

That on or about November 17, 1971,

PASCUAL GUANA-SANCHEZ,

defendant herein, did wilfully and knowingly transport and move within the United States from San Antonio, Texas, to Villa Park, in the Northern District of Illinois, Eastern Division, by means of a motor vehicle, Juan Mata-Zapata, Agustin Olivares-Hernandez, and David Perez-Gutierrez, aliens not lawfully entitled to enter and reside within the United States under the Immigration and Naturalization laws in furtherance of the violation of such laws, knowing that said aliens, Juan Mata-Zapata, Agustin Olivares-Hernandez, and David Perez-Gutierrez, were in the United States in violation of such laws and knowingly and having reasonable grounds to believe that Juan Mata-Zapata, Agustin Olivares-Hernandez, and David Perez-Gutierrez had last entered into the United States less than three years prior to November 17, 1971;

In violation of Title 8, United States Code, Section 1324(a)(2).

A TRUE BILL:

/s/ [Illegible]
Foreman

/s/ [Illegible]
United States Atorney

EXCERPTS OF TRANSCRIPT OF MAY 12, 1972

[41] THE CLERK: 72 CR 50, United States of America vs. Pascual Guana-Sanchez; hearing on defendant's motion to suppress evidence.

• • • •

MR. BEELER: Well, I think the Government is going to proceed in that they have stipulated that the arrest was without warrant for arrest or for search.

Am I correct?

MR. STEVENSON: Well, we have so stipulated, Judge, in the interest of time, and so forth. We are prepared to put our witnesses on.

THE COURT: All right. I keep forgetting the witness stand is on that side now. I keep looking over there. Put your first witness on.

[42] MR. STEVENSON: All right, Judge. Please take the witness stand.

(The witness was thereupon duly sworn.)

PAT VINCENT TENUTO,

called as a witness by the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEVENSON:

Q State your full name, please, and spell your last name.
A Pat Vincent Tenuto; T-e-n-u-t-o.
Q What is your business or occupation, please.
A Patrolman for the Village of Villa Park.
Q How long have you been so employed?
A Just under three years.
Q All right. Calling your attention to—

THE COURT: May I inquire where Villa Park is. Do you mind?

MR. STEVENSON: That is part of what I was going to ask him, Judge.

THE COURT: Yes. Sort of locate it and the [43] nature of the organization of the police department.

MR. STEVENSON: All right.

BY MR. STEVENSON:

Q Did you understand the question?

A Yes.

Q Would you please answer it.

A It is about 17 miles straight west of Chicago. It lies in between North Avenue and Roosevelt Road. It is just about--

THE COURT: Sort of about Lake Street?

THE WITNESS: Yes. We are just a little bit—about a mile south of Lake Street.

THE COURT: If you keep on going out that way you will get to Addison?

THE WITNESS: Do you know where Addison, Illinois is?

THE COURT: Yes.

THE WITNESS: We are the next town south.

THE COURT: Before you get to Addison?

THE WITNESS: Yes. We are just south of Addison.

THE COURT: South of Addison.

[44] BY MR. STEVENSON:

Q Would you describe the type of suburb that Villa Park is in terms of the kind of industry, if any, that is there and the number of persons that live there as opposed to working there.

A Well, the population is about twenty-five to 30,000. The town is basically half residential, half industrial.

Q And is the industry that is there any particular kind of industry as opposed to another kind?

A Mostly small business and factories.

MR. STEVENSON: Is there any other along that line, your Honor?

THE COURT: He might describe the ethnic composition of the town.

THE WITNESS: It is all different types of groups. As far as nationality is, your Honor.

THE COURT: Yes.

THE WITNESS: I have encountered all different types.

MR. BEELER: Your Honor, I would object. The answer is not intelligible.

THE COURT: Well, it is subject to cross-examination. He said all different types.

[45] BY MR. STEVENSON:

Q Well, specifically, Officer, in your educated guess, what is the percentage of white persons who live there?

MR. BEELER: I object to his educated guess as well.

MR. STEVENSON: Well, Judge, is he supposed to know exactly, if the Court please? I am trying to—

THE COURT: Well, the phrase "educated guess" is a word of art. I mean, "What is your best guess?" That is the same thing.

MR. STEVENSON: All right.

BY MR. STEVENSON:

Q In your opinion, what is the percentage of white persons living there?

A About 95, 98 percent.

Q And the percentage of non-white is obvious. Of that non-white population, what would be the percentage of black persons who live there?

THE COURT: Do you mean black in color or in race?

MR. STEVENSON: Black in race, Judge, is what [46] I meant, as opposed to Orientals or some other—

THE COURT: I see.

THE WITNESS: I am sorry, but I am not certain of the question.

BY MR. STEVENSON:

Q Of the non-white five or ten percent who live there, what percentage would you guess are black persons?

A From what I can recall, there are about two black families in the town.

MR. STEVENSON: All right. Anything else, Judge?

THE COURT: How about Oriental or—

BY MR. STEVENSON:

Q Orientals?

A There are quite a few orientals and quite a few Mexicans. I couldn't give you an exact number. I really don't know.

THE COURT: By "Orientals," you mean Japanese?

THE WITNESS: Yes, Japanese, Chinese.

THE COURT: Go right ahead.

MR. STEVENSON: May I proceed?

THE COURT: Yes.

[47] BY MR. STEVENSON:

Q Calling your attention to on or about November 17th, 1971, were you working at your job at that time?

A Yes, I was.

MR BEELER: Your Honor, at this time I would object to the testimony of the witness on the ground that he was present in the courtroom this morning when we had a dress rehearsal of the motion to suppress. He wasn't excluded as a witness. I think that this will render incompetent any of his testimony regarding the subject matter of the discussions this morning. I so move it be suppressed.

THE COURT: I think it can be cleared up by allowing you a wide range of cross-examination. It can stand. Objection overruled.

BY MR. STEVENSON:

Q Were you working on that day?

A Yes, I was.

Q And what were your hours of employment, sir?

A 11:00 P.M. on the night of the 16th to 7:00 P.M. the morning of the 17th.

Q Who, if anyone, were you working with at that time?

A Norman Hall was my partner that night.

[48] Q Were you in uniform?

A Yes, sir, I was.

Q And were you working in a marked vehicle?

A Yes, sir.

Q What was the nature of your duties?

A My partner and I were responsible for all the traffic and patrol duties for the north side of town.

THE COURT: North side? How do you distinguish one part from the other?

THE WITNESS: St. Charles Road is toward approximately the center of town. It is the dividing line. One car handles everything from St. Charles Road north and another car St. Charles Road south, plus a third car, which is the sergeant, he covers both sides of town as our supervisor and back-up unit.

THE COURT: Is there any distinction between the north and the south? Is one more industrial than the other?

THE WITNESS: I would say about half and half.

THE COURT: I see.

THE WITNESS: There is really no difference.

THE COURT: You know, we sometimes think of [49] Chicago, its north side as being the rich side, the south side being the poor side. That isn't the case out there?

THE WITNESS: No, sir.

BY MR. STEVENSON:

Q How many other officers, if any were working at the time you and your partner were working?

A Two others.

Q Now calling your attention to some time about 2:30 a.m., approximately, on the day indicated, did you have occasion to see the defendant in this case?

A Yes, sir, we did.

Q And do you know his name to be Mr. Sanchez?

A Yes, sir, I do.

Q Will you point him out for the record.

A The gentleman sitting next to his attorney (indicating).

MR. STEVENSON: Your Honor, may the record show—

THE COURT: The record may show the witness has identified the petitioner in this Civil Action.

MR. STEVENSON: All right.

[50] BY MR. STEVENSON:

Q And describe the circumstances of your first observation of this defendant, please.

A At the time my partner and I were running radar. We had stopped a vehicle who was doing over the speed limit at North and Addison Road. We got out of our car—

THE COURT: Where is that located, on the north side or—

THE WITNESS: It is on the north side, far north.

THE COURT: Very far north?

THE WITNESS: Approximately, yes. I would say maybe about a half a mile from Addison's jurisdiction.

THE COURT: I see.

THE WITNESS: That is really the only way I could describe it.

BY MR. STEVENSON:

Q All right. After this traffic stop, then what happened, sir?

A My partner went up to the driver and asked him for his driver's license—

Q Wait a minute. Are you referring—

[51] A To the traffic stop.

Q All right.

A I was on the right side of the vehicle. I looked up and I noticed a station wagon parked kitty corner to where we had stopped the vehicle we were talking to now.

Q All right. In terms of feet from where you were, how far would you say it was to the car parked kitty corner from you?

A 150, 200 feet.

Q All right, and describe the car that you saw—strike the question.

What, if anything, did you observe about the car that you saw parked kitty corner from you?

A We noticed—I noticed that the car was completely off the road, over the curb in a vacant lot. The headlights were on and the interior dome light was on.

Q How far from the road was that car?

A 15, 20 feet maybe.

Q Describe the immediate surrounding area of where that car was off the road.

A It would be the industrial section in that [52] section of town.

THE COURT: Is it in a sort of driving area or on the grass or what?

THE WITNESS: Where the car was?

THE COURT: Yes.

THE WITNESS: It is a wooded area. It is like a big clearing in that intersection there. About the size where you could put up maybe a good sized gas station cleared out this much. It was just dirt and gravel.

THE COURT: I see. That was the southeast corner?

THE WITNESS: That would be the northeast corner where the car was.

THE COURT: And you were—

THE WITNESS: On the southwest corner.

THE COURT: That was northeast?

THE WITNESS: Yes, sir.

BY MR. STEVENSON:

Q Were there any persons in that car?

A We could tell there were about three or four people sitting in the car.

Q And were you able to see what, if anything, [53] anyone in the car was doing.

A It appeared that someone—we could see the top part of a paper. I figured it was a map. It looked like the person was lost.

Q Now, how long did you spend on your initial traffic stop there with some other person?

A No more than a minute.

Q And what did you do after completing that?

A My partner and I started to walk back to the squad car. I told him there was a station wagon parked across the street, in the lot with the inside light on. So I said, "Let's go over and see if they are lost or anything is wrong."

Q All right. So did you do that?

A Yes, we did.

Q By what means did you get from where you were to where they were?

A By the squad car; got back in the squad car and crossed the street.

Q All right. Between the time that you entered your squad car and when you next exited, what, if anything, did you do?

A We pulled behind the car, both of us got out; [54] my partner approached the driver's side, I approached the passenger's side.

Q Did you use your radio communication in any way?

A Yes, we did.

Q And describe how you used it.

MR. BEELER: Objection. There is no foundation as to the time sequence.

MR. STEVENSON: I initially stated, Judge, in the area of about 2:30 a.m. I will ask him now, if I may—

THE COURT: Yes, with relation to his pulling up, when—

MR. STEVENSON: All right.

BY MR. STEVENSON:

Q About what time did you pull up behind the defendant's car?

A About 2:32, 2:33.

Q All right, and describe what you did, if anything, before you exited the car.

A We are required before we get out of the car for inspecting a vehicle or traffic stop, or whatever reason at all we have to get out of the car, we have [55] to radio in what we are doing, where we are going to be at and, if it is a car, we have to radio in the license number.

Q Well, as opposed to what you are required to do, what did you do in this instance?

A This is what we did.

Q All right. Now, at my request, did you bring anything with you this afternoon?

A Yes, I did.

Q And what do you have?

A A copy of the radio log that all the departments are required to keep.

Q And what day is the radio log that you have with you?

A Starting from the 16th at 11:00 P.M. to the 17th at 7:00 P.M.

Q May I have, it please.

A (Proffering document.)

MR. STEVENSON: With your permission, this will be marked as Respondent's Exhibit 1 for identification.

THE COURT: Surely. Do you want to substitute a photostat for it?

[56] MR. STEVENSON: If that would be all right with the Court and with Counsel.

THE COURT: Yes. You have no objection?

MR. STEVENSON: Should I mark it myself?

THE COURT: Yes, you may mark it.

MR. BEELER: I have no objection to it being marked. It hasn't been offered yet.

THE COURT: No.

MR. BEELER: I am reserving any objections I may have until I see whether or not it is properly authenticated.

THE COURT: Very well.

MR. STEVENSON: May the record show I am tendering it to Counsel at this time for his examination.

THE COURT: Yes.

MR. BEELER: Thank you.

THE COURT: Are there any houses around there?

THE WITNESS: No. In that particular section it is all industrial, industrial, small businesses. The residential section starts about maybe half a mile south.

THE COURT: Farther south?

[57] THE WITNESS: Yes.

THE COURT: About your police department, is it full-time?

THE WITNESS: Yes, sir, it is.

MR. BEELER: Your Honor, may I have a minute to examine this radio log? Could we have a recess in the testimony while I am examining it?

MR. STEVENSON: Judge, I would ask if I could lay my foundation for it and then before it is submitted, perhaps, so that—

THE COURT: He said "half a minute."

MR. BEELER: It is somewhat cryptic and that is why I have to study it.

MR. STEVENSON: I think, Judge, if he gives the witness an opportunity to point out what it is we are interested in, it might clear up the problem, if that would be all right.

MR. BEELER: Well, the witness can do that after it is admitted into evidence.

BY MR. STEVENSON:

Q May I hand back, Mr. Witness, what has just been marked as Respondent's Exhibit 1 for identification, purporting to be a Xerox copy of the radio report to which [58] you have just testified. Can you identify that document?

A Yes, I can.

Q And what is it?

A It is a copy of the original radio log.

Q All right. Who made the copy?

A I made it, or I had a cadet make a copy. I was standing there watching him.

Q After you made the copy did you compare it with the original?

A Yes, I did.

Q And is it a true and accurate copy?

A Yes, it is.

Q Now, is that radio report kept in the regular and ordinary course of your police business in Villa Park?

A Yes, sir, it is.

Q And is it part of the police business to keep and maintain that radio log?

A Yes, sir, by orders of the Federal Communications System.

Q Are the entries made on—

THE COURT: It is?

THE WITNESS: Yes, sir. All police departments are required to keep some type of radio log on all [59] transmissions.

BY MR. STEVENSON:

Q Are the entries made on that—

THE COURT: The question is whether you do it or not.

THE WITNESS: Yes, sir. Well, our department, I definitely can say we do it. I can't speak for the other departments surrounding us.

BY MR. STEVENSON:

Q Are the entries made on that exhibit made at the time of or soon after the events recorded have occurred?

A They are recorded immediately when we call in.

Q All right. Now I call your attention to the document and ask you if your particular radio communication is indicated?

A Yes, it is.

Q And where is it indicated?

A The second line on page 2.

Q All right. Do you recognize the handwriting of that entry?

MR. BEELER: Your Honor, it is not offered into evidence yet.

[60] MR. STEVENSON: I haven't gotten to that point yet, Judge. I think is the final foundation question.

THE COURT: He may answer.

BY MR. STEVENSON:

Q Do you?

A Yes, I do.

Q And whose is that writing?

A It is our night radio dispatcher, Joan Block.

Q And was that person on duty at the time we have been referring to?

A Yes, sir, she was.
THE COURT: She?
THE WITNESS: It is a woman dispatcher.
THE COURT: I thought you said that the cadet—
THE WITNESS: No, the cadet made a copy of this during the day.
THE COURT: Oh, I see. The cadet rolled it off?
THE WITNESS: Yes.
THE COURT: How many cadets do you have?
THE WITNESS: Two.
THE COURT: How many policemen?
THE WITNESS: Including the chief lieutenant, [61] we have approximately 30, 35.
THE COURT: But just two were on duty on the north side and two on the south side and one vehicle with the commander?
THE WITNESS: On that particular night there were two on the north side, one on the south and the commander.
THE COURT: Out of 35 police officers there were four on duty?
THE WITNESS: Yes, sir.
MR. STEVENSON: Judge, at this time, if it please the Court, I do offer this into evidence for purposes of this hearing.
MR. BEELER: No objection, your Honor.
THE COURT: Received.

(And thereupon Respondent's Exhibit No. 1 was received in evidence.)

BY MR. STEVENSON:

Q All right, now, again, point to your particular radio transmission and indicate for the record page 2—
A Page 2, line 2.
Q —and tell what the entry is, please.
A At 2:33 in the morning it shows that Officer [62] Hall and I were checking out a—
MR. BEELER: Objection.

BY MR. STEVENSON:

Q Just read what it says.
A Okay, it shows—
THE COURT: No, let him go ahead and spell it out the way he chooses.
MR. BEELER: We would like to know what it says first.
THE COURT: He can tell us what it says.
THE WITNESS: Okay. At 2:33 in the morning our car, which was at that time 130, it shows that Officer Hall and I were checking out at North and Addison with a car, license number CV 4433.

BY MR. STEVENSON:

Q All right. When you say it shows you were checking out—is that the term you used? What does it show you were doing at that point?
A It shows that we were busy with this car.
THE COURT: But are the words "checking out" used there?
THE WITNESS: We use signals. "10-6," which means we were busy checking out, and we give the [63] license number, which automatically means to the desk they are busy checking out this car.
THE COURT: 10-6 means—
THE WITNESS: It is a code for "busy."
THE COURT: That is the international code of police communications?
THE WITNESS: Yes, sir.
THE COURT: And 10-6 is checking out, that is, that you are investigating a situation, isn't that right?
THE WITNESS: Yes, sir.
THE COURT: Where was your 10-20?
THE WITNESS: North and Addison.
THE COURT: Is that where your 10-20 was?
THE WITNESS: Yes, sir. It shows right on the log here.
THE COURT: And you were investigating a car located at North and Addison?
THE WITNESS: Yes, sir.

THE COURT: 10-6 is an investigation of a car where the 10-20 was North and Addison, right?

THE WITNESS: Yes, sir.

MR. STEVENSON: All right.

[64] BY MR. STEVENSON:

Q Now, after making this radio communication, did you exit your car?

A Yes, sir, we did.

Q And what happened next?

A Officer Hall went up to the driver's side; I went over to the passenger's side. Officer Hall asked the driver if anything was wrong or if we could be of any help.

Q All right. What, if any response, was made?

A The driver said that they were looking for a restaurant on North Avenue that a friend of his owned.

Q Who was the driver?

A Mr. Sanchez.

Q Is that the man you pointed out earlier?

A Yes, sir, it is.

Q What further conversation occurred, if any?

MR. BEELER: Your Honor, we would object to any further conversations.

THE COURT: Why?

MR. BEELER: Miranda v Arizona.

MR. STEVENSON: Judge, there is no custody here. There is no suspect. There is no investigation of any crime.

[65] MR. BEELER: They were investigating—10-6.

MR. STEVENSON: You can investigate without investigating a crime, Judge. Where is the custody, if the Court please?

THE COURT: I think that the 10-6 is broad enough to include any situation that involves their just looking to see what they can see and it does not really involve the Miranda thing at this time. He may go ahead.

MR. STEVENSON: I might remind the Court there is no mention before this Court to suppress on Miranda grounds any statements or anything of the sort.

THE COURT: At this time.

MR. BEELER: Your Honor, I would correct that impression. The motion to suppress states, I believe on page 1, to set the record straight—no, on page 2, item 3 of the motion to suppress and dismiss. So I think that is an issue involved.

THE COURT: It is an issue. He can go ahead.

BY MR. STEVENSON:

Q All right. Before I ask you to continue on that, I would ask you, how many persons, if any, were in the car other than the driver?

[66] A Including the driver, there were four.

Q And how were they positioned in the car?

A Mr. Sanchez behind the wheel, another passenger by the right front door, and two passengers, one right behind Mr. Sanchez and another one right behind the passenger in front.

Q What, if anything, were the passengers doing?

A The passenger behind Mr. Sanchez was asleep and the other two were just sitting there.

Q All right. What, if anything, did you observe inside the car while you stood there?

A I observed approximately three shopping bags that looked like they contained some type of clothing or material.

Q All right, and what was Mr. Sanchez doing at the time?

A He had a map in his hand and he was looking for this restaurant.

Q All right. Could you tell us what the map was of?

A It looked like a state map of Illinois or the Chicagoland area.

Q Okay. Continue then with the conversation from [67] the point of the restaurant where you left off.

A We asked him if he knew the name of the restaurant or could give a better location. If I remember right, he said he didn't know the name, he just knew it was on North Avenue someplace in Lombard. Then he stated that if he couldn't find that he was looking for a Beef & Barrel.

THE COURT: Do you want to put that in quotes? Would that have meant to you then the name of a place?
THE WITNESS: Yes.
THE COURT: Beef & Barrel? Do you know a Beef & Barrel?
THE WITNESS: I know of one in Lombard, which is the town next to us.
THE COURT: What is the Beef & Barrel?
THE WITNESS: It is a restaurant. I have never really been in there but I—
THE COURT: Where they serve hamburgers and beer?
THE WITNESS: I have never been in there.
THE COURT: But they do have a Beef & Barrel in Schiller Park?
[68] THE WITNESS: In Lombard.
THE COURT: How far north of Lombard are you?
THE WITNESS: Lombard is the town just west of us. We are in between Elmhurst and Lombard.
THE COURT: Yes. Lombard is on Roosevelt Road on your way to DeKalb?
THE WITNESS: Yes.
THE COURT: And Schiller Park is just east of Lombard?
THE WITNESS: Villa Park is just east of Lombard.
THE COURT: Yes. It extends over toward Addison?
THE WITNESS: Yes.

MR. BEELER: Your Honor, at this time I would like to make a motion. I just observed that the other police officer is still in the room, despite your indication this morning that the motion to exclude witnesses would be proper when the testimony began. I feel that—

MR. STEVENSON: I have no objection to the other officer leaving, Judge.

THE COURT: All right.

[69] MR. BEELER: I feel the officer has violated what was clearly your attempt this morning when you ruled—

THE COURT: No, he hasn't violated anything, I haven't made any ruling.

MR. BEELER: All right. I would ask that the Government's witnesses be excluded during the testimony and that they be directed not to talk with one another until this case is decided regarding the subject matter—

THE COURT: Well, both sides may have the same motion.

MR. STEVENSON: All right, we move to exclude any defense witness as well, Judge.

THE COURT: They may be excluded. Both sides will instruct their witnesses not to converse with each other about the testimony that is going on—about the testimony.

MR. BEELER: Thank you, your Honor.

THE COURT: Exclude your witnesses.

BY MR. STEVENSON:

Q What was the conversation after the mention of the Beef & Barrel Restaurant?

[70] A He said he was looking for this restaurant. He had a matchbook that had the Beef & Barrel on it with the address on Butterfield Road in Lombard.

Q Now, when you are referring to "he"—

A Mr. Sanchez.

Q All right. Up to this time did any of the other occupants do or say anything?

A No. They just sat there.

Q All right. What happened next?

A We told him where—

THE COURT: Who did the talking?

THE WITNESS: I think the other officer.

THE COURT: I see.

THE WITNESS: I was on the other side of the car.

THE COURT: The other officer told him—

THE WITNESS: Yes.

THE COURT: That is what you were about to—

MR. BEELER: Right. I wasn't sure who the "we" was—

THE COURT: When you say "we" why, he would want to know which of the two of you were doing the talking.

[71] THE WITNESS: The other officer was doing the talking. I was on the other side. I could hear what was going on.

BY MR. STEVENSON:

Q All right. What did he say?

A We told him which direction the Beef & Barrel was. We—I went back to the squad. I radioed some of the other towns if they knew of an all night restaurant that was open in their town which might have been the owner, his friend, and the other towns replied that all the restaurants are closed after midnight or 1:00 o'clock.

THE COURT: Did he give the name of the owner?

THE WITNESS: If he did, I don't recall it.

If I remember right, he didn't—

THE COURT: Do you mean the owner was a friend of Mr. Sanchez?

THE WITNESS: Yes, sir, but I believe he couldn't recall the name of the restaurant and I don't believe we asked him the name of the owner. If we did, I don't recall.

THE COURT: Go ahead.

BY MR. STEVENSON:

Q After the radio communication to the other [72] towns, what happened next?

A We asked him for some type of identification and he produced a driver's license.

Q When you say "we", who—

A Or Officer Hall asked him for some type of identification.

MR. BEELER: Objection. At this time, your Honor, I would renew my motion predicated on Miranda v. Arizona and the cases following that, and I will also interpose various Illinois cases and United States vs. Conto Sirano, 430 Fed. 2nd, a Seventh Circuit case recently affirmed by the Supreme Court.

THE COURT: The time to assert a Miranda situation, which properly would be asserted by a motion to strike is after the witness has had an opportunity to put in evidence what actually happened.

MR. BEELER: I don't believe there is any rule against being—

THE COURT: Premature?

MR. BEELER: —premature.

THE COURT: All right.

MR. BEELER: I just have an objection to—

[73] THE COURT: It is just that you are premature.

MR. BEELER: —to the question and to the answer that it is designed to elicit.

THE COURT: I have to hear it and then strike it, if it is to be stricken.

MR. STEVENSON: I don't recall what the last answer was.

THE WITNESS: Officer Hall asked him—

MR. STEVENSON: For identification. All right.

BY MR. STEVENSON:

Q Did the defendant give Officer Hall anything in your presence?

A A valid Illinois driver's license.

THE COURT: A what?

THE WITNESS: Illinois driver's license. A valid license.

THE COURT: "Valid"?

THE WITNESS: Illinois driver's license.

THE COURT: How did you know it was valid?

THE WITNESS: I checked the expiration date.

THE COURT: Oh, I see. "An apparently valid Illinois driver's license."

THE WITNESS: Yes, what appeared to be a valid [74] Illinois driver's license.

MR. BEELER: At this time we would object to the answer based on Miranda vs. Arizona and also, of course, the Fourth Amendment. There is no probable cause to require Mr. Sanchez to produce private papers. We would also object to everything which follows this particular juncture in this investigation.

THE COURT: Well, he didn't say that he required him to produce it; he said he asked him for identification and he produced it.

MR. BEELER: He also stated that he was a policeman in uniform, that he was driving a marked car, and I think the cases are universal in holding that when a person consents to that kind of request from a uniformed police officer that is not a waiver of any rights the person has.

THE COURT: No, it wouldn't be a waiver.

MR. BEELER: It is not an intentional relinquishment of a known right.

THE COURT: It wouldn't be a waiver of that right. At the same time, it doesn't impoverish the nature of the testimony now. He can testify [75] to what he did. It is still a little premature.

BY MR STEVENSON:

Q Again would you pick it up from the point of the driver's license, please.

A We asked Mr. Sanchez if he had any identification and he produced a valid Illinois driver's license.

MR. BEELER: Objection. Okay. Well, your Honor, I am going to object to that.

THE COURT: We are right back where you objected the last time so let's move on from here and then come up with another one.

MR. BEELER: Well, I am not objecting on the same ground, although I would like to have a continuing objection to everything that follows here on the grounds stated earlier.

THE COURT: You have a standing bill on that.

MR. BEELER: Okay, but I am objecting to this answer on the ground that it begins "We told him," therefore, it is unintelligible. Also, it doesn't relate to the conversation, the characterization. I think he should answer as to what he said.

THE COURT: To the best of the witness's ability he should say, "He said; I said" or "the [76] other officer said." You may proceed.

BY MR. STEVENSON:

Q You have the driver's license. Now what happens?

MR. BEELER: Your Honor, you have ruled on my

objection and I gather you have sustained it—my motion to strike the answer.

THE COURT: No, I neither struck nor did I sustain nor overrule you. I just said "We will go on from here." It is without prejudice to your objecting later on it. You may proceed.

MR. BEELER: Are you denying my motion then? I just want the record to be clear as to whether that answer is in evidence or not.

MR. STEVENSON: May I proceed, Judge?

THE COURT: If you stand on your motion I will have to deny it without prejudice. You may proceed.

BY MR. STEVENSON:

Q After Officer Hall obtained the driver's license, what happened next?

A Officer Hall asked the other three gentlemen in the car for some type of identification.

Q What did he do with the driver's license?

[77] A He gave it back to Mr. Sanchez. I believe he gave it back to Mr. Sanchez. I can't recall offhand.

Q All right. After making this request of the other three persons, what did they do or say?

A They shrugged their shoulders and went kind of like this. (Demonstrating.) Like "What is he talking about? I don't understand him," "You know, what does he want?"

MR. STEVENSON: All right, indicating for the record palms outward, a shrug of the shoulders, if the Court please.

THE COURT: Very well.

BY MR. STEVENSON:

Q Then what did Officer Hall do?

A He asked them again and got the same reaction.

Q All right.

A Then he asked Mr. Sanchez if he spoke Spanish and could ask them if they had any identification.

Q All right. Did he do that?

A Yes, he did.

THE COURT: You knew that it was Spanish?

THE WITNESS: Mr. Sanchez told them something. We were taking it for granted that he was asking, [78] "Do you have any type of identification on you?"

THE COURT: You don't understand—

THE WITNESS: We don't know for sure.

THE COURT: You don't know for sure?

THE WITNESS: No, sir. We were taking it for granted this is what he asked.

BY MR. STEVENSON:

Q All right, after he said something in Spanish—

THE COURT: He said he doesn't even know whether it was in Spanish.

MR. STEVENSON: All right.

BY MR. STEVENSON:

Q After he said something in a language you did not understand, what did the three persons in the car do or say?

A They shook their heads "No" to give the impression that they didn't have anything, except for the person in the front seat; he took out a card and gave it to us.

Q All right. Was the fourth person that you mentioned earlier sleeping at this time or—

A Yes. He was the person behind Mr. Sanchez.

Q All right. So what did he do or say, or was [79] he still sleeping?

A When Mr. Sanchez asked for some type of identification from them, if they had any, the guy, the person sitting next to him woke him up.

Q All right. After they indicated a shake of their heads to whatever was said by Mr. Sanchez, then what happened?

A The person sitting in the front seat handed Officer Hall some type of card.

Q All right. Did Officer Hall tell you what it was or show you what it was?

A He showed me what the card was.

Q What was it?

A It was some type of card. It was written in Spanish. I saw the words "Army," "military," and "Mexico." So I took it to be a Mexican Army I.D. card.

Q All right. What was done with that card at that time?

A It was given back to him.

Q What happened next?

A The other two in the back shook their heads, "No" to give the impression that they didn't have anything. Officer Hall asked Mr. Sanchez to repeat the [80] question to them to make sure that they understood it, and he repeated it about two times, that that was the question he asked them.

Q All right. What happened next?

A Due to the fact that it was 2:30 in the morning and it was in an industrial area, we didn't know who they were, and we have had some type of burglaries in that area—

MR. BEELER: Object to that, your Honor. There is no foundation for that type of—

THE COURT: Sustained.

BY MR. STEVENSON:

Q All right, just what did you do?

A We called the sergeant over the radio. We told him that we had two persons without any I.D. cards or identification, and the sergeant came up and—

Q All right, how long after you called him did he come to you?

A A minute or two?

Q Then what happened?

A We asked the two gentlemen or asked Mr. Sanchez to have the two gentlemen in the back if they would get out of the car.

[81] Q All right. Did they get out?

A Yes, they did.

Q And what did they do when they got out of the car?

A The sergeant, due to the fact that they didn't have any identification on them, the sergeant asked if they would mind coming to the station through Mr. Sanchez.

MR. BEELER: Your Honor, I am going to object to that. He said that a person, that is, a sergeant, due to the fact that they had no identification, asked them if they would go to the station, which means that this officer who is testifying knows what was in the other man's mind. I think that is incredible.

THE COURT: He said that he asked them to produce identification. Would you change that "due to the fact that they didn't produce any."

MR. BEELER: I would still object to the answer. He doesn't know why the police officer asked them to come to the station, unless he was told, and then he can relate a conversation. But he is looking into his mind.

THE COURT: After having asked them to produce [82] any identification and their not having produced it, he then asked them to come to the station.

THE WITNES: If they would come to the station so we could check—

THE COURT: Did he say if they would or did he tell them to come to the station?

THE WITNESS: I believe he asked them.

THE COURT: How?

THE WITNESS: Through Mr. Sanchez. The only way we did everything was through Mr. Sanchez.

THE COURT: Do you recall the words he used?

THE WITNESS: Not offhand.

THE COURT: Was it "Will you come to the station" or "Come to the station"?

THE WITNESS: It was more like, "We would like you to come to the station so we can run a check on the two to make sure that they are not wanted for anything, they are not criminals" or just a general check to see who they were.

THE COURT: If you come to a corner and see a car and you see someone sitting in a car—this is day, night or otherwise—do you customarily approach that car and ask the person in it, not [83] just the driver, but the other persons in it, to produce identification, and if they fail to produce identification, then you take them into the police station to see who they are?

THE WITNESS: This is done at night.

THE COURT: Why at night?

THE WITNESS: Because we have had quite a few burglaries in the industrial area, it being that time of morning without any identification, we don't know who they are, what they are doing there—

THE COURT: But suppose you don't; do you have to?

THE WITNESS: It is standard operating procedure for our department.

THE COURT: That is SOP, standard operating procedure. Go ahead.

MR. BEELER: Your Honor, he did relate in answering your question once again something about burglaries without any foundation and I would ask that that be striken.

THE COURT: Well, he is explaining the reason for this SOP. It doesn't relate to this car. It [84] is just as a matter of standard operating procedure "we asked them to come on in and help us find out who they are if they don't have any identification."

MR. BEELER: All right.

THE COURT: (Addressing the witness) And that means any car you come across?

THE WITNESS: During the night shift that we have occasion to stop or check out for some reason.

THE COURT: What are the reasons that you would stop or check out?

THE WITNESS: Either a traffic violation or if we saw the car parked off the road, such as Mr. Sanchez, or if we see a car parked on the side of one of the factories with some people in it.

THE COURT: This is to clear up any suspicion in your mind that they may be doing something wrong?

THE WITNESS: Yes, sir.

THE COURT: If you see them changing a tire you know they aren't doing anything wrong at that moment?

THE WITNESS: Well, especially if we see another flat tire there, but we still ask them for some type of identification.

[85] THE COURT: Because they still might be using that as a hoax?

THE WITNESS: Yes.
THE COURT: You are doing a general 10-6 of the whole area?
THE WITNESS: Yes, sir—or not of the whole area, the persons there.
THE COURT: I see.
MR. STEVENSON: All right.

BY MR. STEVENSON:

Q Did the two persons exiting Mr. Sanchez's car enter the police vehicle?
A Yes, sir, they did.
Q And what happened with Mr. Sanchez and the other person?
A Officer Hall asked him if he wouldn't mind coming to the station so we could check out the two persons who did not have any identification.
Q And what was said in answer to this request?
A He says "Fine, I will come with you."
Q Did you then go to the station?
A Yes, sir, we did.
Q All right. Now, how far is the station in [86] distance, in miles, from the point of the stop—or I don't mean that—from the point where they entered your police vehicle?
A From the stop to the police station?
Q Yes. Well, the car was stopped when you got to the scene, wasn't it?
A Yes. From that point to the police station?
Q Yes.
A Two, two and a half miles.
Q And in terms of time, how long did it take you to get there?
A Three, four minutes.
Q All right. Now, would you describe the vehicle that Mr. Sanchez was in at the time in question.
A It was a Pontiac station wagon. I believe it was a '69.
Q All right. And what, if anything, was unusual about the exterior of the car?
A Well—

THE COURT: Do you mean that you assume that there was—
MR. STEVENSON: I said "if anything," Judge.
[87] THE COURT: Was there anything unusual about the exterior?
THE WITNESS: It was dirty, the body.
THE COURT: Do you mean dirty in the back?
THE WITNESS: All over. The car needed a wash.
THE COURT: And all cars in Villa Park are always washed?
THE WITNESS: That I couldn't say. This is about the only thing I noticed about the car.
THE COURT: I'm glad mine isn't out there today. It really needs a wash job.

BY MR. STEVENSON:

Q All right. Now, did any police officer enter into Mr. Sanchez's car?
A No.
Q At any time from the point of your initial contact with Mr. Sanchez up to the time that you arrived back at the police station?
A No.
Q When you arrived back at the police station, what happened there? First of all, about what time did you arrive back there?
A 2:45, 2:46.
[88] Q And what happened when you got there?
A All four of them were brought inside, brought to the sergeant's office.
Q Then what happened?
A We got—
THE COURT: They were brought inside? I don't understand. What happened? You see, there is a difference between they went inside, they were brought inside, they were taken inside.
THE WITNESS: Well, we motioned, "Go through that door into this office," you know, "just have a seat in the chair."
THE COURT: And they did it?
THE WITNESS: Yes.

BY MR. STEVENSON:

Q Okay. What happened at that point?

A We got the names of the two persons without identification. We got their names, dates of birth.

THE COURT: How?

THE WITNESS: Through Mr. Sanchez.

THE COURT: One at a time?

THE WITNESS: One at a time.

THE COURT: Who asked the questions?

[89] THE WITNESS: I believe it was the sergeant asked Mr. Sanchez. Mr. Sanchez just, I believe, interpreted. We gave the two gentlemen—or we gave three of them a piece of paper and a pencil, and they wrote their name, printed their name and their age.

THE COURT: Did you tell them to write it?

THE WITNESS: I don't believe—I can't recall if we told them to write it or print it. We just asked them to put their name down.

THE COURT: You mean when you say you asked them—did you do it in such a manner that it would have been silly for them not to have done it?

THE WITNESS: I don't believe so.

THE COURT: Well, what—

THE WITNESS: To run this check, we figured if we had their names printed on there we could pronounce them more clearly, and if we knew how old they were—

THE COURT: So instead of asking them you told them, isn't that right?

THE WITNESS: We asked Mr. Sanchez, if they can, to write their names.

[90] THE COURT: And he said yes, they can?

THE WITNESS: I believe he told them to write their name or "Will you write your name?" I don't know exactly how he told them, but they picked up the pencils and they started writing their names.

THE COURT: They obeyed Mr. Sanchez?

THE WITNESS: Yes.

THE COURT: And he obeyed you?

THE WITNESS: Yes.

BY MR. STEVENSON:

Q All right, tell us the next thing, please.

A Sergeant Weiser contacted the night number of immigration and I believe he talked to a Chief Partin. I can't be certain about that. I believe it was Mr. Partin who talked to each one of the three persons.

MR. BEELER: I think I am going to object to this testimony. It sounds very much like hearsay or want of personal knowledge.

THE COURT: Well, he can describe what he saw. What he is saying is Mr.—who was it?

THE WITNESS: My name?

THE COURT: No, the other officer, the sergeant.

[91] THE WITNESS: Oh, Sergeant Weiser.

THE COURT: (Continuing) —the sergeant called somebody and then that somebody on the other end of the line was apparently talking to each of the men.

THE WITNESS: Yes.

THE COURT: And they talked in a language which you didn't understand.

THE WITNESS: Yes, sir.

MR. STEVENSON: Judge, of course, this is a motion to suppress and the main stay of a motion to suppress is that hearsay is acceptable on the issue of—

THE COURT: The Government is strong enough not to have to depend upon hearsay.

MR. STEVENSON: Well, at this particular moment, Judge, I am not sure how much this particular part of it has to do with the issues before the Court, but certainly a hearsay objection in a motion to suppress is not a valid objection.

THE COURT: We haven't gotten into anything that is hearsay at this point.

[92] BY MR. STEVENSON:

Q Were you present when the sergeant spoke over the phone?

A Yes, I was.

Q And were you present when the three passengers spoke over the phone?

A Yes.

Q After the three passengers talked over the phone did any of the police officers then speak over the phone again?

A Sergeant Weiser spoke to Chief Partin, if that is who was on the other end.

Q All right. Could you hear one side of the conversation?

A The sergeant's side.

Q All right. What did you hear?

A I heard Sergeant Weiser say that the three gentlemen admitted that they were in the country illegally, and Mr. Partin asked the sergeant to hold all four of the gentlemen until immigration could come out in the morning.

Q All right. Now, from the time you arrived—

THE COURT: Just a minute now. You say you [93] heard whom say that?

THE WITNESS: The sergeant.

THE COURT: That they admitted that they were in the country illegally?

THE WITNESS: Yes, to this Mr. Partin, over the phone.

THE COURT: But had you heard them make that admission?

THE WITNESS: They were speaking in Spanish. I don't know what they were saying. This is what was translated from Mr. Partin to the Sergeant and then to myself.

THE COURT: Oh, you heard Mr. Partin talk to the sergeant?

THE WITNESS: I saw the sergeant on the phone with him and Mr. Partin told the sergeant—

THE COURT: But did you hear Mr. Partin?

THE WITNESS: No, I could not hear him.

THE COURT: Then you don't know what he said?

THE WITNESS: No.

THE COURT: But what did the sergeant say?

THE WITNESS: The sergeant said that Mr. Partin told him that the three gentlemen admitted that they [94] were in the country illegally and Immigration

would be out around 7:00 or 8:00 o'clock in the morning and to hold all four gentlemen for Immigration.

BY MR. STEVENSON:

Q All right. Now, from the time you got to the station to the phone call, approximately how much time passed?

A Four or five minutes.

Q All right.

MR. BEELER: I am sorry. I did not hear that.

THE COURT: Four or five minutes.

THE WITNESS: Four or five minutes.

BY MR. STEVENSON:

Q All right. Will you explain—strike that. How did it happen that your police station had a night phone number for the Immigration Service?

A In our area—

MR. BEELER: I object to that. I think it assumes facts not in evidence. How did they happen to have—

THE COURT: Yes, it assumes, of course, that he couldn't have looked it up in the telephone directory.

[95] MR. STEVENSON: All right. I believe that is correct, if the Court please.

BY MR. STEVENSON:

Q Have you personally had any prior experience with immigration cases?

A Yes, I have.

Q And how many occasions?

A Approximately three.

Q How long before the one we are talking about now was the last one?

A About a week before.

Q And, briefly, and summarize, what were the circumstances of your prior experience?

MR. BEELER: Your Honor, I object to this on grounds of irrelevance.

MR. STEVENSON: Judge, I would like to be heard on that point. The recent case of Harris vs. New York states that when the issue is probable cause the amount of information that an officer making an arrest has in

his mind based on his prior experience with the person or the crime in question is a relevant issue. They overruled Spinelli to that affect.

[96] THE COURT: When were they arrested?

BY MR. STEVENSON:

Q Would you answer that, please.

THE COURT: No, I—

MR. STEVENSON: Do you mean—

THE COURT: I am asking you. From his testimony.

MR. STEVENSON: When you say "they," Judge, who are you referring to?

THE COURT: The three in this case.

MR. STEVENSON: On November 17th?

THE COURT: No, at what point in this procedure?

MR. STEVENSON: I am afraid I don't understand your question.

THE COURT: Well, an arrest takes place at some one time, some moment.

MR. STEVENSON: Yes, Judge.

THE COURT: When did that moment occur as to the three men?

MR. STEVENSON: I would say that it occurs at the time of the phone call, Judge. That would be my opinion.

THE COURT: Well, how would the phone call [97] constitute an arrest of them?

MR. STEVENSON: Well, the information engendered by the person at the other end of the phone to these officers would then be the amount of information for the arrest to occur.

THE COURT: Before that phone call was made, if one of them had broken out of the door and run out of the police station, what would you have done?

THE WITNESS: Chased after them.

THE COURT: Then what would you have done?

THE WITNESS: Run him back to the station and try to determine why he ran.

THE COURT: But suppose you couldn't have caught him; what would you have done?

THE WITNESS: Nothing.

THE COURT: Do you mean just let him escape?

THE WITNESS: I would try to the best of my ability to recapture him.

THE COURT: How far would you have gone to try to recapture him?

THE WITNESS: Until I lost sight of him.

THE COURT: But suppose you catch up with him [98] but you can't just quite get up there?

THE WITNESS: Just keep going until I can't go any further.

THE COURT: Then what would you do?

THE WITNESS: As far as I know, there is not too much more I could do.

THE COURT: Would you have pulled out your gun and told him to halt?

THE WITNESS: No, I don't believe so.

THE COURT: Would you have shot in the air?

THE WITNESS: I don't think I would have.

THE COURT: Would you have shot in the ground?

THE WITNESS: I don't think I would have pulled out my gun at all, honestly.

THE COURT: You would have just gone back and said "He got away"?

THE WITNESS: That is about it.

THE COURT: Have you had that kind of experience before?

THE WITNESS: I have had it a couple of times with juveniles.

THE COURT: What did you do with them?

THE WITNESS: Well, I finally caught them.

[99] THE COURT: Do you mean you outran a kid?

THE WITNESS: It took some doing but I did it. They just said, you know, "We were just scared."

THE COURT: Yes. Did you ever find one where you had to shoot to stop him?

THE WITNESS: I have never run across the situation yet.

THE COURT: Would you?

THE WITNESS: I don't think I would.

THE COURT: Why?

THE WITNESS: I don't believe a gun should be drawn unless your life is in danger or somebody else's life is in danger.

THE COURT: Yes.

THE WITNESS: I think this is the only time a gun should be drawn. This is one of the reasons why we carry Mace with us.

THE COURT: You would have used Mace?

THE WITNESS: If he resisted in any way once I caught up to him. Just enough force, reasonable force, to bring him back.

THE COURT: But you would have tackled him?

THE WITNESS: If it was the only way I could [100] have stopped him, yes.

THE COURT: So that short of using a gun, when you don't know whether or not what he has done is a felony or a misdemeanor, you would have just gotten him, that is all?

THE WITNESS: Yes.

THE COURT: Then brought him back?

THE WITNESS: Yes, sir.

THE COURT: And inquired as to why he ran?

THE WITNESS: Yes.

THE COURT: If necessary, you would have used Mace?

THE WITNESS: If it came to that point.

THE COURT: To stop him or to protect yourself?

THE WITNESS: Protect myself if he tried to resist in any way.

THE COURT: By trying to resist, what do you mean—you would have laid hands on him?

THE WITNESS: Trying to swing at me or trying to injure myself in any way. If he tried to injure me in any way.

THE COURT: But your aim and your purpose would have been to have stopped him?

[101] THE WITNESS: To stop him.

THE COURT: And prevented his further escape?

THE WITNESS: Yes, sir.

THE COURT: Because you would have at that time considered him really your prisoner, isn't that right?

THE WITNESS: I would consider so to find out why he ran.

THE COURT: And as far as these three men were concerned, at the time you walked them into the police station you considered them as your prisoners, didn't you?

THE WITNESS: Not exactly prisoners, just—

THE COURT: Halfway prisoners?

THE WITNESS: Well—

THE COURT: One-quarter way prisoners?

THE WITNESS: I don't know. In my own mind I really wouldn't consider them prisoners at all. Just finding out what they are doing there, who they are.

THE COURT: And however without drawing blood you could have done that, you would have done it, isn't that right?

[102] THE WITNESS: That is right.

THE COURT: Because you knew of no felony that they had committed?

THE WITNESS: No, sir.

THE COURT: And you respect the old Illinois case law that says that you may not draw blood even to prevent the escape of a misdemnant, isn't that right?

THE WITNESS: Yes, sir. I am not familiar with that law. This is the first time I have heard of that law. This is what I personally would have done.

THE COURT: But if it is a felon you would use such force as is necessary?

THE WITNESS: If I knew for sure it was a felony, the only time I would have used a gun is if he turned around and had some kind of a weapon, he was going to shoot me or throw a knife at me, something like this.

THE COURT: But if you don't know whether it is a misdemeanor or a felony, or whether it is nothing at all, you still would see to it that you retain hold of him or control of him until you find out what it is?

[103] THE WITNESS: Yes, sir.

THE COURT: And, short of drawing blood, you would have done that, isn't that right?

THE WITNESS: Yes, sir, if he would have taken off.
THE COURT: I am sorry to have interrupted you.
MR. STEVENSON: Not at all, Judge. I was in the process of asking him about his prior experiences with immigration cases. May I continue in that vein for a brief moment or so, Judge?
MR. BEELER: I have an objection based on relevance. He mentioned the Harris case. There is nothing to show that the police officer here perpetrated this arrest at Addison & North based on any violation of the immigration laws. I don't see the connection that any past experience with immigration offenses would have regarding this offense.
Secondly, there are all kinds of immigration laws. Being defense counsel in this case, I have acquainted myself with them recently. There are hundreds of immigration laws defining a multitude of different offenses. So I don't think that his [104] past experience with immigration offenses in general establishes any requisite criteria—
THE COURT: But he may be of the opinion from his past experiences that any time you find four Mexican men in a car in the stealthy middleness of a dark night, 2:30 in the morning, parked off the side of a highway at a corner in—what is that park?
MR. STEVENSON: Villa Park.
THE WITNESS: Villa Park.
THE COURT: Villa Park, they have to be illegally in the United States and, thus, in violation of the laws of the United States. That may be his experience and that may have been in his mind or his partner's mind.
The state of mind has a great deal to do with the nature of an arrest when it occurs.
MR. BEELER: I still don't think three prior immigration cases would supply enough familiarity for the officer to know that that—
THE WITNESS: Personally, three.
THE COURT: Three. Well, that would be the basis of his experience and the state of his mind.
[105] MR. BEELER: Yes, but I don't think he could learn that through three cases. It would take more experience.

THE COURT: Well, his state of mind may have grown from those three cases.
MR. BEELER: Well, all right.
MR. STEVENSON: May I proceed, Judge?
THE COURT: Yes.

BY MR. STEVENSON:

Q All right. Did I understand you to say your last experience before the one in question was about a month and a half before this, is that correct?
A About a week before.
Q All right, whatever it was, briefly relate the circumstances of that experience.
A We have a farmhouse at the south end of town that is just outside of our jurisdiction in an unincorporated territory. DuPage County got a report that this farmhouse was housing illegal entries from Mexico. DuPage County requested help from us in going in and checking this building out.
Q All right. Did you do that?
A Yes, sir, we did.
[106] Q And what, if anything, did you find there?
A Quite a few people illegally in this country.
Q Did any of those persons speak English?
A Not that I recall.
Q Did any of those persons have identification of the United States in any way?
A No, sir, I do not believe so.
Q Did you have any prior experience with a Mexican military card such as one of the persons in the car in our instance showed you?
A No, sir.
Q All right. Briefly relate the next to the last experience before the one you just mentioned.
MR. BEELER: Your Honor, again I would object to this line of testimony, particularly on grounds of relevance.
MR. STEVENSON: Judge, I—
THE COURT: Do you mean it doesn't show state of mind?
MR. BEELER: It is possible that it will show state of mind but state of mind in the abstract is not relevant.

THE COURT: Well, state of mind is one of the [107] criteria for finding out when an arrest has taken place. Then the question is presented, when the arrest took place was the Miranda warning given? Then the question also is presented, did the arrest take place for a violation of a law for which the officer had legal authority to perform an arrest?

So you have to find when the arrest took place. All Counsel is trying to do is help us locate that time by showing his state of mind. Is that what you are doing?

MR. STEVENSON: That is correct, Judge. May I proceed?

THE COURT: You may proceed.

BY MR. STEVENSON:

Q Before you get to the next one, the next experience, referring you to the farmhouse that you just spoke about, did you have occasion to determine how those Mexican aliens got to where they were arrested?

A I learned that they were transported by car.

MR. BEELER: Your Honor, I would object to that answer as not relating the source, there is no indication it comes from a reliable source.

[108] THE COURT: It is a part of his experience.

MR. BEELER: That is not part of his experience if he learned it from an unreliable source.

THE COURT: Regardless of how he learned it, if he learned it later, it becomes a part of that mental process which then we can pinpoint came into play at a certain time.

MR. BEELER: All right, as long as—

THE COURT: And the question of when it came into play may rely heavily on these experiences. It may have come into play at the time he looked across the street and saw that there were three persons quite easily identifiable physically as Mexicans, and walked across the street and said, "What can we do to help you?"

At that very moment he may then have been in a state of mind of performing an arrest and at that moment an arrest took place. Or it may not have occurred until after they were in the police station.

MR. BEELER: I would withdraw the objection insofar as it relates to his general state of mind, except to my general objection to that line of [109] inquiry. But I do object to it as contributing directly—

THE COURT: As to materialty you are quite correct. But as to state of mind I think, well, I don't want to lead this examination; I will let you two gentlemen fight your own battles.

MR. BEELER: Do I understand then that he can answer only with regard to his state of mind it is not admissible as far as his showing of probable cause, that is, specific knowledge?

MR. STEVENSON: Judge, good faith or bad faith on the part of the purported arresting officer is always an element of the reasonableness with which your Honor is most concerned. I am not saying if he has good faith that that is the ball game, I don't mean to say that, but surely good faith or bad faith in the state of mind area is a requisite consideration for the Judge in any case where they are seeking to suppress the evidence.

THE COURT: I wasn't thinking in terms of good faith or bad faith, I am sure he acted out of good faith, but I was concerned with the state of mind.

[110] MR. STEVENSON: I understand that, Judge, but—

THE COURT: Because state of mind in a—

MR. STEVENSON: As to his past experiences.

THE COURT: —in an arrest case the state of mind pinpoints the moment when he himself considered himself putting the other man under arrest.

MR. STEVENSON: I understand.

THE COURT: And nowadays you just don't put a man under arrest by saying, "You are now under arrest," and if he can't speak English, I mean, you just can't say it in Spanish. You tell him to do something. You ask him if you can do something. "Let me see your identification. Get out of the car."

Or you may do none of those things if at the moment your state of mind is not such as would cause you to say that there has been a misdemeanor or some crime that has taken place. You may honestly mean it

when you come up and say "Can I be of service to you?" If the party on the inside of the car says "No. I am sorry. Thank you very much. You can't be of any service to me" you would [111] honestly walk away.

But under the circumstances if the state of mind, even at the time, looking across the road there, he sees these men who are obviously Mexican and he walks over and says, "May I be of service to you?" His state of mind may have been such as would cause those words to really mean "You are now under arrest. From here on you will do what I tell you to do. If you seek to escape, short of drawing blood to stop you, I will do everything I can to stop you. I am taking you in." That is when the arrest takes place.

When did it happen? That is the problem. That is a hard thing to figure out. It is hard for a Judge to always figure out. Policemen don't use the language "You are under arrest." If I were a policeman I wouldn't. I wouldn't say, "You are under arrest," I would say everything but that in order to protect myself so that if it came to a question I could place the actual time of arrest at the time that is most convenient for my situation. A tactful policeman won't say that. When there is a crowd around he will say it but out in the dark of [112] the night, at 2:30 in the morning, with no other automobile around and four Mexicans in a car parked off the road, when you walk across there and say, "May we be of service to you?" If your experiences have been such that in each of such instances it has been found that the persons you have stopped were here in the country illegally, you place them under arrest that very moment.

(Addressing the witness) That is when you did it. Don't you think so?

MR. STEVENSON: Are you referring now to this particular case, Judge?

THE COURT: In any such case. I was using—

MR. STEVENSON: No, I don't think so at all, Judge, most respectfully. If that is true, then any person who is pulled off the road at a late hour, where an officer

pulls up to find out what he is parked on the side of the road for—

THE COURT: He is arrested.

MR. STEVENSON: He is arrested, Judge?

THE COURT: Why not?

MR. STEVENSON: Why should he be, Judge? If you use the example that—

[113] THE COURT: But suppose he refuses to do it?

MR. STEVENSON: Refuses to do what, Judge?

THE COURT: To pull off the road?

MR. STEVENSON: Well, again, that is not what happened here so—

THE COURT: No, but suppose the one you were telling me about, if they refused to do it?

MR. STEVENSON: All right, in other words, if a car is in motion and an officer makes a gesture to pull off on the side of the road and the car doesn't do it, is that your Honor's question?

THE COURT: That is right.

MR. STEVENSON: Courts have held he could be pulled over for a traffic offense, Judge.

THE COURT: Isn't that an arrest?

MR. STEVENSON: A stop for traffic reasons is not an arrest, Judge. Courts have held that.

MR. BEELER: Your Honor, I would suggest—I don't want to jump in here, but the majority of Courts have held to the contrary.

THE COURT: Suppose there had been no traffic violation and the police officer well knew there had been no traffic violation, haven't you a right [114] to under his state of mind at the time?

MR. STEVENSON: Yes. A question to anybody who did that would be, "What did you motion them off the side of the road for?"

THE COURT: So these other experiences he has had are material to his state of mind.

MR. STEVENSON: That is one reason why I am seeking to elicit this information, Judge, but Counsel continues to object.

THE COURT: I know. Objection overruled.

BY MR. STEVENSON:

Q Now, the second of your prior experiences, would you briefly relate that one, please.

A It was basically the same thing with DuPage County only it happened over in Addison. They had a report that this building housed quite a few Mexican people who had entered into the country illegally, that they were brought in either by bus or truck.

Q All right.

A So we were asked to assist.

THE COURT: Asked by whom?

THE WITNESS: The Addison Police Department, to assist them.

[115] THE COURT: I see.

BY MR. STEVENSON:

Q All right. Did any of these persons in the second instance speak English?

A If they did I didn't know it. They were speaking mostly Spanish.

Q Did any of them have United States identification cards of some sort?

A No.

Q All right.

A At least not that I recall.

Q And, finally, would you briefly summarize the last of your prior experiences.

THE COURT: You mean the first.

MR. STEVENSON: All right, I should say the first

THE COURT: Yes.

BY THE WITNESS:

A The first one goes back about four or five years ago when I was part-time police officer in another town. It was the same thing only it was in that particular town. The detective got information that there were some illegal aliens in there and a bunch of us [116] were detailed to go over there and make sure nobody got away.

THE COURT: In each of those instances did you hold these people until the Immigration people came?

THE WITNESS: Yes, we did.

THE COURT: And no other Federal officers came before the Immigration people came?

THE WITNESS: If they did I am not aware of it.

THE COURT: I see.

MR. STEVENSON: I have just a couple of more questions.

THE COURT: All right.

BY MR. STEVENSON:

Q What reason, if you know, do Mexican aliens go to Villa Park and surrounding communities?

MR. BEELER: Objection, your Honor. I think that that—

MR. STEVENSON: It is part of his experience, Judge, as to why they are there.

THE COURT: Who is representing whom?

MR. BEELER: I think I am representing the [117] defendant and I think this is properly objectionable. I don't know what the answer is that Mr. Stevenson is trying to elicit but he is asking the police officer to testify about other persons' motives. There has been no foundation that he knows what other persons' motives are. I think it is objectionable. It calls for an opinion. It calls for something over which he has no personal knowledge.

MR. STEVENSON: May I rephrase the question then, Judge?

BY MR. STEVENSON:

Q Did any of the persons to whom you have just alluded, arrested for immigration purposes, ever indicate why they went to Villa Park or a surrounding area to you?

MR. BEELER: I would object to that.

THE COURT: Do you mean arrested by whom?

MR. BEELER: There is no foundation. It covers a myriad of persons. It doesn't involve how he would learn this.

THE COURT: Well, if he could pin it down to whether or not he arrested him.

MR. STEVENSON: Well, if he answers yes, Judge, then I will lay the foundation before I ask what was [118] told to him, but I have to find out if there is anything in existence before I can lay my foundation.

MR. BEELER: I think the prosecutor has indicated that he is fishing and I think he should make his foundation first. This is his witness. He can't ask questions like that and decide whether there is going to be a foundation, having gotten inadmissible evidence in in the process. Either he knows or he doesn't. If he doesn't, he should withdraw the question.

THE COURT: It is part of the state of mind issue?

MR. STEVENSON: Yes, sir.

THE COURT: He may answer.

MR. BEELER: Well, my objection is not to the state of mind; I just said he doesn't have proper foundation. I think you have agreed with that.

THE COURT: It is a general question relating to these four experiences or three experiences, prior experiences. (Addressing the witness:) What did you find? He may answer.

BY MR. STEVENSON:

Q Do you recall the question?

[119] A Why did they come to the Villa Park area?

Q No; did any of them ever tell you or indicate in some way to you why they came to Villa Park?

A Because there are small factories there and most of the factories are looking for cheap labor.

MR. STEVENSON: That will be all I have, Judge. Thank you, your Honor.

THE COURT: Do you want to let me dispose of this other matter before you cross-examine? It won't take but a few minutes. You needn't leave. You can stay right where you are.

MR. BEELER: Thank you.

(And thereupon the Court directed its attention to another matter on its call, after which the following further proceedings were had herein:)

THE CLERK: 72 CR 50, United States of America vs. Pascual Guana-Sanchez; further proceedings.

CROSS EXAMINATION

BY MR. BEELER:

Q Officer Tenuto, do you know if there is a police report filed with the Villa Park Police Station in connection with the investigation you conducted at North and Addison Streets on November 17, 1971?

[120] A Yes, sir, there was.

Q And had you seen that police report?

A Yes, I have.

Q Do you have a copy of it with you?

A Yes, I do.

Q May I see it, please.

A That is the whole thing right there.

MR. BEELER: This is five pages, your Honor. Perhaps we should have a recess or I can read it while the Court waits, whatever you wish.

MR. STEVENSON: Your Honor, for the record—

THE COURT: I usually read five pages in about a minute.

MR. BEELER: I wish I could.

MR. STEVENSON: Judge, for the record, it is my understanding that at least two or three pages have been tendered to Counsel some time much earlier than right now.

THE COURT: Yes. What about your 2.04 conference?

MR. BEELER: Mr. Mars voluntarily gave me two pages, although your Honor didn't require it, and he said that he would have given me the full report [121] had he had it available. He also told me that at such time as the full report became available he would give it to me in advance of trial. However, the case was assigned to Mr. Michael Stevenson, who is presently prosecuting the case.

I told him of Mr. Mars' agreement. I told him that it was not ordered by the Court, that it was done as a courtesy by Mr. Mars, and Mr. Stevenson indicated that he was not of a like mind and that he wouldn't produce the remaining pages of the police report and that I would have to wait until the police officers testified on

direct examination at the hearing before I could have the police report.

Is that correct, Mr. Stevenson?

MR. STEVENSON: That is correct. There is one other thing I said, Judge. Pardon me. One other thing I said was that my decision was based on all of the Court authorities that I was acquainted with.

THE COURT: Over and above those, we have throughout the Courts of the United States over the last several years tried to cut this thing short of the rules and decisions. Trying to get that one, [122] we have had to depend upon the prosecution, unless they have something that they want to hide which they have a right to hide. Just show them everything you have and get it over with as early as you can.

This is the whole philosophy of the 2.04 conference. The purpose of it is to try—we even recommend that you show the reports that are available only under Section 3500 after the witness has testified on direct at the 2.04 conference. We can't make you. If he comes in on a motion for them, why, I deny the motion.

But unless there is a good reason to withhold the information, we think that full discovery speeds the disposition of the case. In fact, we have found in one jurisdiction, in the Southern District of California, that it increased the pleas of guilty from somewhere around 60 percent all the way up to 80 percent, and we have fewer cases to have to try. This is our purpose.

But, be that as it may, he has them now; the question is, do we have time to have a recess or why don't you just sit down there for a couple of minutes and look at them real fast?

[123] MR. BEELER: Thank you, your Honor.

THE COURT: Unless you want a recess. A short recess would help me find my correspondence so that my secretary can go on home at 5:00 o'clock. We can come back in five minutes.

MR. BEELER: I am all in favor of giving every consideration to secretaries so I am agreeable with that suggestion.

MR. STEVENSON: Judge, I would only remind the Court that this officer worked all night. He has been here all day. He has to work tonight starting at 11:00 P.M. So I would appreciate the Court's consideration of his and his partner's schedule, to the extent your Honor is able to consider it.

THE COURT: All right. We won't be but a few minutes.

MR. BEELER: Thank you, your Honor.

(Recess)

THE COURT: You may proceed.

BY MR. BEELER:

Q Officer Tenuto, you realize you are still under oath now?

A Yes, sir, I do.

[124] Q Were any other police reports made that you know of in connection with this case which you have not given to me?

A This particular case?

Q In connection with this particular case.

A No. That is the report.

Q So there are no other reports involving the defendants or—

A On this charge, no.

Q Are there any other reports regarding the three passengers of his motor vehicle?

A Everything is included right there.

Q Thank you, Officer. Now, have you talked with anyone about this case prior to your testimony here today?

A Yes, I have.

Q With whom did you talk?

A Mr. Stevenson.

Q When was that?

A Last Tuesday or Wednesday.

Q I see. Where were you when you were speaking with him?

A In his office.

Q And that was in the Federal Building?

[125] A Yes.

Q And who was present on that occasion?
A Myself, Mr. Stevenson, Officer Hall and two agents from Immigration.
Q I see. Was anyone taking any notes or making any record of the conversation at that meeting, if you know?
A No, not that I know of.
Q Did anyone have a note pad out.
THE COURT: Is that important?
MR. BEELER: It might be.
THE COURT: Are you fishing?
MR. BEELER: I think I am fishing. I certainly wouldn't know if the Government had notes because of course, I don't go fishing through their files. The only way I have of learning this—
THE COURT: What is it you want to know?
MR. BEELER: I want to know if Mr. Stevenson or the Immigration officers have any notes of their conversations.
THE COURT: Which indicate what?
MR. BEELER: Relating to the subject matter of his direct examination.
[126] THE COURT: You expect such notes would show what?
MR. BEELER: I don't know what they would show. I hope they would show a complete lack of probable cause.
MR. STEVENSON: Judge, I will state for the record that I have two pages of yellow legal pad where I wrote the questions out I intended to ask along with a lot of other notes, and I will be happy to tender them to the Court. I don't think—
THE COURT: No, I don't think they are material to the issue.
MR. BEELER: Well, I think the Court should at least examine them, although I think defense counsel—
THE COURT: For what purpose?
MR. BEELER: To see whether—
THE COURT: The issue is, when was he arrested and by whom? And did they have authority to arrest him.
MR. BEELER: Well, there are other issues involved in cross-examination. There is credibility. There is ability to remember and discern. There is a possibility of a prior contrary statement. I [127] think these are all legitimately within the scope of cross-examination. It is one of the few tools defense Counsel has, the occasion to observe his previous statements or records.

THE COURT: What does that record show Mr. Sanchez was arrested for?
MR. BEELER: The police report?
THE COURT: Yes, sir.
MR. BEELER: My own interpretation is it doesn't show he was arrested for anything; that he was arrested because he was in the wrong place at the wrong time.
MR. STEVENSON: I will object to that characterization, Judge, for the record.
THE COURT: It shows something else?
MR. STEVENSON: The police report does indicate something other than what Counsel has said, yes.
THE COURT: What does it say he was arrested for?
MR. BEELER: I will object to Mr. Stevenson testifying.
THE COURT: You are objecting to my questioning Counsel?
[128] MR. BEELER: Well, I am objecting to Mr. Stevenson putting evidentiary matter before your Honor.
THE COURT: Well, you won't tell me so I have to ask him.
MR. BEELER: No, I think I did tell you. I think that the police report shows what I say it shows. Mr. Stevenson has his answer, because he doesn't understand what an arrest is, your Honor. He thinks a man is not arrested until he is manacled, and that a person can be dragged off to a police station, held there past 2:30 A.M. in the morning, required to answer questions, to talk with Immigration officers on the telephone, all of these things, and he is not under arrest, that the man is only under arrest when they decide to slam the cell shut, that is when he is under arrest, and at that time perhaps they had charges to place against him, but that is not the way an arrest is defined.

THE COURT: Does the report show what the arrest was for or does it show that he wasn't arrested?

MR. BEELER: I think it shows that he was arrested and he wasn't charged until considerably [129] later.

THE COURT: Charged with what?

MR. BEELER: Eventually he was charged with the charges here.

THE COURT: But the police didn't charge him with anything.

MR. BEELER: I think he was eventually charged, you know—this is not evidentiary matter, but he was eventually charged with possession of a firearm because his glove compartment was searched after he was taken through the police station and interrogated there. He had been given a firearm as a Christmas present by an uncle in Texas and he had carried it to Illinois and, having arrived here, it was not registered.

THE COURT: When with relation to his being taken into the police station—was he ever locked up?

MR. BEELER: Yes.

THE COURT: When with relation to when he was locked up was he charged with possession of a firearm?

MR. BEELER: I am not sure.

THE COURT: (Addressing the witness) When?

[130] THE WITNESS: He was placed in a detention cell after the Immigration authorities told us to detain Mr. Sanchez until they came out in the morning.

THE COURT: Oh, that is when he was arrested? It was after they came out that you found the gun in the glove compartment?

THE WITNESS: It was just before this. While this was going on, you know, the gun was found in the glove compartment.

THE COURT: And when was he booked for that?

THE WITNESS: As soon as the gun was found.

THE COURT: But he was already behind bars then?

THE WITNESS: No, sir. He was sitting in the sergeant's office. He was placed in the detention cell after the gun was found after he was charged with possession of the gun and after the DuPage County forms were processed.

THE COURT: But before then he wasn't arrested?

THE WITNESS: No, sir.

THE COURT: Was he free to go?

THE WITNESS: Yes, sir.

THE COURT: Did you tell him he was free to go?

THE WITNESS: I don't believe he was told [131] because we never really told him to come to the station; we asked him if he would come.

THE COURT: But having asked him if he would come and his coming anyway, if hadn't have come why, you would have taken him in anyway, isn't that right?

THE WITNESS: No, sir. We really didn't have anything to bring him into the station for.

THE COURT: Do you mean he made the mistake of just obeying your—of just yielding to your request?

THE WITNESS: Yes, sir.

THE COURT: You may go ahead.

MR. BEELER: Mr. Stevenson has offered to tender his notes for an in camera examination. I take it that has been denied?

THE COURT: No, I will look at them.

MR. STEVENSON: All right, Judge, may the record show I am handing to the Court two pages of yellow legal pad with various notes in every corner and in various colors. (Proffering documents)

THE COURT: Go right ahead. I can hear and read this, too. It will save time.

[132] BY MR. BEELER:

Q Before you testified today did you consult or refer to any writing which may have refreshed your memory?

A Just the reports.

Q Did you refer to the handwritten notes on the yellow paper?

A No. Everything was done strictly from the reports that Officer Hall and myself typed up.

Q And when did you refer to those?

A About two days ago.

Q Thank you. Have you read any of the legal papers filed with the Court in this case?

A No, I haven't.

Q Have you read the indictment?

A No, sir.
Q Do you know who testified before the Grand Jury which indicted the defendant?
A No, sir.
Q Did you testify before the Grand Jury?
A No, sir.
Q Do you know if any of your fellow police officers testified before the Grand Jury?
A No, sir, I do not.
[133] Q Do you know that they didn't testify before the Grand Jury?
A I don't know if they did or they didn't.
Q If they had done so, was it a part of the usual and ordinary course of business of the Villa Park Police Station—would a report have been made of the fact that they testified before a Federal Grand Jury?
A It would have been added onto that report right there.
Q So that it would have been a part of the file here?
A Yes.
Q So, based on that practice, then, you know that no Villa Park Police Officer did testify?
A Yes, sir.
Q Were you subpoenaed to testify here today?
A I was asked to come down.
Q But you weren't subpoenaed?
A No, sir.
Q Officer Tenuto, would you tell me how many Mexican Americans there are on the Villa Park Police Force?
MR. STEVENSON: I will object to that, Judge, as having no relevance to anything here.
[134] THE COURT: Well, of course, traditionally I let it in.
MR. STEVENSON: All right.
THE COURT: I see nothing here.
MR. BEELER: All right, I would ask it be made a part of the record.
THE COURT: Well, you can give us a copy later on.
MR. STEVENSON: All right, your Honor.
THE COURT: We can impound it.
MR. BEELER: Thank you, your Honor.

BY MR. BEELER:

Q How many Mexican Americans are there on the Villa Park Police Force?
A That I know of, none.
Q How many were there that you knew of on November 17, 1971?
A None that I knew of.
Q How many Negro Police Officers are there on the Villa Park Police Force?
A None.
Q Was that also true on November 17, 1971?
A Yes, sir.
[135] Q Based on your experience as a police officer and with immigration cases, are you able to recognize the difference between individuals of Puerto Rican ancestry and those of Mexican ancestry?
A No, I am not.
Q Are Puerto Ricans American citizens?
THE COURT: If you know.
MR. BEELER: If he knows.

BY THE WITNESS:

A I really couldn't say for sure. I don't know.
THE COURT: Well, I will inform you. By birth they are. Even born in Puerto Rico, they are American citizens.

BY MR. BEELER:

Q When was the last time you were in the vicinity of North and Addison Roads in Villa Park, Illinois?
A 6:30 this morning.
Q Does the area of that intersection appear substantially similar to how it did on November 17, 1971?
A Yes, sir, it does.
Q The basic topographical features are the same?
A Yes.
Q What time does the night shift start?
[136] A 11:00 P.M.
Q Is that the time it started on November 17th?
A Yes, it did, except for one man on each shift starts one-half hour earlier.

Q So there is one man starting the night shift at 10:30?
A Yes. He is considered the early man.
Q But he is part of the night shift?
A Yes, he is considered part of the night shift.
Q Thank you. You were in uniform that evening, November 17th?
A Yes, sir, I was.
Q Do you have a badge?
A Yes, sir.
Q Were you carrying any weapons?
A Yes, I was.
Q What weapons were those?
A A .38 Smith & Wesson four-inch barrel.
Q Was that visible?
A Yes, it was.
Q And were you carrying Mace?
A Yes, sir.
Q Was that visible?
[137] A Yes, sir.
Q What kind of Mace can was it that you had?
A It is—
THE COURT: It is not always in a can, is it?
MR. BEELER: I don't know. I try to avoid Mace to the best of my ability. I am assuming a fact not in evidence.

BY MR. BEELER:

Q What kind of container do you carry your Mace in?
A It is a leather holster. It is strapped to my belt.
Q And inside that there is Mace?
A Yes.
Q Do you carry a club?
A We take one with us in the car but it usually remains in the car. The only time we usually take it in is in family fights and things of that nature.
Q Do you carry handcuffs?
A Yes, we do.
Q Where do you carry those?
A In a pouch also attached to my belt.

[138] Q And do you have any other pouches attached to your belt?
A One other one—extra ammunition.
Q And would a person viewing you, dressed in your ordinary police gear, be able to tell that you were carrying weapons on your belt?
A Yes.
Q Would they be able to tell the general nature of the weapons or the paraphernalia—
A Yes.
Q Were the other police officers on patrol that evening similarly attired?
A Yes, sir, they were.
Q Now, when you observed the car at North and Addison you said that you made a license plate check, is that correct?
A We radioed in the license plates.
Q Can you recall the license number?
A CV 4433, I think it is, or something.
Q Is that an Illinois license plate?
A Yes, '71, I believe, Illinois.
Q All right, and that wasn't a downstate license plate, was it?
[139] MR. STEVENSON: Objection, Judge. There is no way to tell a downstate license plate.
MR. BEELER: That is for the officer to answer.
THE COURT: If he knows.

BY THE WITNESS:

A Well, at the time we had no idea if it was downstate or local or what.

BY MR. BEELER:

Q Did you get a radio report back on that license plate?
A When we got into the station there was a check—or, no, I believe we got the report before we went into the station. I could tell for sure if I could look at the radio log.
Q That is a fair request.

MR. BEELER: Would the record show I am handing the witness what has been admitted into evidence as Government's Exhibit 1?

THE COURT: It may so show.

BY THE WITNESS:

A We radioed in the plate and we got an answer back approximately three to five minutes later, who the plate belonged to and if the car was stolen or not.

[140] BY MR. BEELER:

Q All right, and according to the information you received from your dispatcher, who did the car belong to?

A The driver, Mr. Sanchez.

Q And what was the address?

A I would have to refer. 9727 South Avenue L in Chicago.

Q And that wasn't a different address from the one on his driver's license, was it?

A As I remember it was the same.

Q And the report indicated that the car was not stolen, is that correct?

A Yes, sir.

Q That also indicated the car wasn't wanted in connection with any crime?

A Yes, sir.

Q By the way, was there a Marathon gasoline station open across Addison Road at that time?

A There is a Marathon gas station across the street but they close about 11:00 o'clock or midnight. They were closed at that time.

Q Now, when you approached the defendant's motor [141] vehicle, at any time prior to asking the passengers for identification were the occupants of the car ordered out of the vehicle?

A Before—

Q Before the passengers were asked for identification?

A No.

Q Were they ordered out for questioning before that time?

A No, sir.

THE COURT: When were they ordered out, if at all?

THE WITNESS: After we found out that they did not have any identification and the sergeant came up there, when he said, "Let's bring them into the station and check them out and see who they are, if they are wanted by anybody."

THE COURT: So you had them follow you?

THE WITNESS: Yes, sir.

BY MR. BEELER:

Q Now, when Officer Hall asked the defendant whether he had an I.D., what would you and Officer Hall have done as part of your usual police practice if he [142] had refused to show you one?

MR. STEVENSON: I object. It calls for speculation. It is no part of this case.

MR. BEELER: He says it is part of his usual police practice—

THE COURT: Well, reword it: Does your manual or your usual police practices provide what you should do in case a person refuses to take out his i.d.?

THE WITNESS: Chapter 95 and ½ of the Illinois Vehicle Code states that a driver of a vehicle must show his driver's license on demand to a police officer. So, usually, in this case, if somebody refuses to show a driver's license we can hold them there or bring them into the police station until we find out if this person has a valid driver's license from some state.

THE COURT: You don't search them?

THE WITNESS: If it comes to a point where we have to take them into the station, yes, we do.

THE COURT: I see. Do you search the car?

THE WITNESS: Yes, sir, usually.

[143] BY MR. BEELER:

Q When you search the car, do you search the glove compartment?

A Yes. We usually search the entire vehicle.
Q Do you search the trunk?
A Yes.
Q Under the seat?
A Yes.
Q Under the hood?
A I have rarely gone that far.

THE COURT: If you don't need to go under the hood, Counsel, it wastes time. I mean, sort of beam—in on your real issue. (Addressing the witness) When did you search the car and find the gun?

THE WITNESS: After the vehicle was brought to the police station.

THE COURT: And that was before you talked with Mr. Harding—is that his name, the officer, the customs officer?

MR. STEVENSON: Partin.

THE WITNESS: This was before they called Immigration.

THE COURT: And it was after these people were [144] taken inside the station?

THE WITNESS: Yes, sir.

MR. STEVENSON: Judge, that weapon is not evidence in this case in any way.

THE COURT: No, the weapon is not evidence.

MR. STEVENSON: So the manner of—

THE COURT: The timing of the search bears upon the arrest and weather or not they were under arrest. It was a search incident to an arrest, isn't that true?

MR. STEVENSON: Well, Judge, I don't think that issue is before the Court since the only reason for ruling on the question is as to whether to exclude evidence or not, and since there is no evidence in the form of a weapon, I don't think the Court needs to consider that problem.

THE COURT: No, no, I wasn't considering the problem of the weapon except in relation to the timing of the arrest.

MR. STEVENSON: All right, Judge.

THE COURT: In other words, was he arrested before or after there was a telephone conversation, then the search of the car as an incident of the [145] arrest would indicate that he was really under arrest at the time the car was searched and, under arrest, the question is "for what?"

As this young man says—I forget his name—was he under arrest for just being the wrong person at the wrong place at the wrong time, or was he under arrest just to find out whether or not to arrest him?

In other words, was it what is provided for under the Code of the District of Columbia, and that is reasonable detention under the theory of suspicion, which is short of probable cause, which is the basis of arrest under Illinois law?

Then the next simple question is, when a final arrest was made of him, was the arrest made on behalf of Immigration or was it made because of the gun? Which comes first? It is a matter of timing, you know, what happened in the police station. The faster you cut that short, the quicker we can get this police officer home.

MR. BEELER: Fine.

BY MR. BEELER:

Q Did you ever advise the defendant of his [146] constitutional right, you, personally?
A Not that I recall.
Q Isn't it true that the first person to advise him of his constitutional rights were the Immigration Officers who appeared at the police station?

THE COURT: The next morning?

MR. BEELER: The next morning.

BY THE WITNESS:

A I have no idea. Officer Hall and myself got off duty at 7:00 o'clock, and, from what I understand, the Immigration authorities came at 8:00.

BY MR. BEELER:

Q I see. So prior to 7:00 o'clock no one warned the defendant of his constitutional rights?

A Not that I know of.

Q Fine. That is also true of the three passengers of his car, isn't it?

A As far as I know.

Q Okay. Showing you once again Government's Exhibit 1 and, once again, the second page of it, there is a notation in a column called "Car Number," it indicates on the first line "130," the second line, "130"—the third line, can you read that?

[147] A Well, 130 is the car number that Officer Hall and myself were in—

Q That is your car?

A That is our car. We radioed in, gave the desk operator the license plate number and asked her to run a check on the license plate number. It is the usual practice when we ask for what is called a 10-28, you know, license plate check, the whole thing is written on the next line, which would be the license number, Mr. Sanchez' name, his address, the city he lives in and the type of car.

Q I see. So that was on the third line?

A Yes. It is always entered on the radio log whenever we ask for a license plate check.

Q Then on the fourth line it indicates the car location of North and Addison for another vehicle, is that correct?

A 132.

Q Is that when the second car appeared on the scene?

A Yes.

Q And that was 2:37 P.M.?

A Yes.

[148] Q And on the next line down, the same location, North and Addison, and on the following line also, North and Addison, it indicates both cars, "10-59, two subjects." That means escorted to police station?

A Yes.

Q On the line below, that is the first, second, third, fourth, fifth—

A This one right here?

Q —sixth, seventh line down, once again at North and Addison, that is your car; the reference is "10-59 complete."

A This means we were at the station.

Q I see. That means that you arrived?

A Yes.

Q Thank you. It was after you were at the police station that the defendant's automobile was searched?

A Yes.

Q And did he execute any release or authorization or consent to have his car searched?

A No, sir, not that I know of.

Q How long after he got there did you search the car?

[149] A About a minute or two. Just enough to—

THE COURT: But he had gone on in?

THE WITNESS: Yes, sir.

THE COURT: Then you searched the car?

THE WITNESS: Yes.

BY MR. BEELER:

Q Back at North and Addison, after you and Officer Hall had gone over to the defendant's car and after Officer Hall had asked the defendant for an I.D. and after the defendant had produced his driver's license, and after Officer Hall had returned the driver's license, what would you and Officer Hall have done if the defendant then drove off immediately in his car without asking your permission?

MR. STEVENSON: Objection.

THE COURT: Do your regulations or procedures prescribe what you would have done? Sustained.

Objection sustained.

MR. BEELER: All right.

THE COURT: Or practices.

BY MR. BEELER:

Q Then after—

THE COURT: Just take my question. It is [150] faster.

MR. BEELER: Okay.

BY MR. BEELER:

Q After the defendant had his driver's license returned to him, according to either your training as a police officer of Villa Park or according to your usual practice and custom, what would you as a reasonable police officer do if the defendant then immediately drove off without asking your permission?

MR. STEVENSON: Objection again for the record.

THE COURT: You got it mixed up with, you know, a personal injury case. You are not asking him to testify as an expert, you are asking him what the custom or regulation or manual—

MR. BEELER: Or his own practice.

THE COURT: Or his own practice.

MR. BEELER: As a working police officer in the field.

MR. STEVENSON: Judge, that question assumes that the officer has had a prior experience which is the basis for his answer or asks for a blatant speculation, Judge, none of which is relevant here because it didn't happen.

[151] MR. BEELER: This is cross-examination, your Honor.

MR. STEVENSON: Oh, it doesn't make any difference, Judge. He has got to stay within the bounds of the issues we have, otherwise we will be here forever, if he goes off on everything that didn't happen. The possibilities are a million.

THE COURT: If I send Mr. Sanchez up I may send him up forever, so we might as well take our time with it. I mean, I can't be impatient. At the same time, I sort of wish the defense attorney would hurry up so I could get the police officer home.

What are your practices or procedures in that case?

THE WITNESS: We would get back in the squad and take off after him and pull him off again.

THE COURT: And you have done this on prior occasions, haven't you?

THE WITNESS: Myself, no, I have never ran into that type of situation, but there have been other officers

in the department who have run into that type of situation.

[152] BY MR. BEELER:

Q Okay. I think I have only about one other question. Would you mind standing up from the witness stand—

THE COURT: Would you care to ask the Court for permission to have the witness stand down?

MR. BEELER: Your Honor, may I have the witness approach the easel?

THE COURT: He may stand down.

MP. BEELER: Thank you.

BY MR. BEELER:

Q Are you familiar with the intersection of Addison Road with North Avenue in Villa Park?

A Yes, I am.

Q And the topographical features around it?

A Yes, I am.

Q Okay. I show you Defendant's Exhibit A for identification and ask you whether or not this is a true and accurate picture or representation of the northeast corner of the intersection?

A Yes, it is.

Q And is it a true and correct portrayal of the intersection at the time of the arrest of Mr. Sanchez last [153] November?

A Yes, it is.

Q That is, there has been no appreciable change of conditions?

A About the only difference I can see—I really can't be sure—is that this bench may have been removed. I don't recall seeing it lately.

Q All right. Now, would you mark—

MR. STEVENSON: Judge, I am going to object to any questions about this exhibit on the ground that it is clearly daytime and the testimony is that all of what we are talking about happened at 2:30 at night, therefore, it is not an appropriate exhibit in this case.

THE COURT: You didn't mean to use that exhibit to slip in the words "at the time he was arrested," did you?
MR. BEELER: No, that wasn't the purpose, although that was the answer.
THE COURT: It is a leading question on cross-examination. You have a right to ask leading questions but that can slip a witness up. You have got his testimony now that he arrested him there.

[154] BY MR. BEELER:

Q All right. Officer Tenuto—
THE COURT: And yet the position of the prosecution in this case is that he was never arrested.
MR. BEELER: Your Honor, I would like to offer this exhibit, Defendant's Exhibit A, into evidence.
THE COURT: To show what?
MR. BEELER: To portray the intersection at the time of November 17, 1971. Admitting that this is a daytime photograph, the topographical features have not changed. I would have the witness mark with an "S" the location of Mr. Sanchez' motor vehicle at the time he was arrested, just so the Court can see.
THE COURT: You are still using that "at the time he was arrested."
MR. BEELER: All right, "at the time of the occurrence." I am sorry. I have a mental set, I am afraid.
THE COURT: What part of the occurrence?
MR. BEELER: Well—
THE COURT: Are you trying to establish that he was arrested?
[155] MR. BEELER: No; I simply want to locate his vehicle.
THE COURT: Why do you want that?
MR. BEELER: Well, I think it helps clarify the setting, that is all.
THE COURT: I have no lack of clarity about it as he described it, as the officer described it.
MR. BEELER: Well, I think it is still admissible. Your Honor may not care to give it very much weight but I think it has been properly authenticated.
THE COURT: Well, what does it show?

MR. BEELER: It shows the scene which he described.
THE COURT: What does showing the scene do?
MR. BEELER: In case your Honor or a reviewing Court would want to draw any inferences as to probable cause from the scene, they would be in a better position to evaluate what inferences would be proper and what wouldn't.
THE COURT: Probable cause for what?
MR. BEELER: Probable cause for whatever occurred there.
THE COURT: Go ahead.
[156] MR. BEELER: Is it admitted into evidence?
THE COURT: Yes:
MR. STEVENSON: Over our objection, I hope, Judge?
THE COURT: Yes.

(And thereupon Defendant's Exhibit A was received in evidence.)

BY MR. BEELER:

Q Would you mark with my pen a letter "S" where Mr. Sanchez' motor vehicle was sitting when you first spotted it and when you approached it.
A It is a little difficult to pinpoint exactly. Facing North Avenue I couldn't do it exactly. It was on Addison Road. It was approximately, because of this bench here, approximately right along here, in this area right here. (Marking exhibit)
Q Okay. It was in front of the bench?
A Being night, I couldn't even recall if the bench was there or not. I don't recall seeing a bench at the time. It would be behind the bench closer to Addison Road, which is this street right here. (Indicating)
Q I see. All right. Which road is Addison Road?
A It is this road right here.
[157] MR. BEELER: Okay. Thank you. No more questions.
THE COURT: Is there any redirect examination?
MR. STEVENSON: No redirect, your Honor.
THE COURT: Very well. Do you mind if the other officer comes back Monday?

MR. STEVENSON: No, Judge. He would be more for that than anybody.

THE COURT: Yes, because, I mean, he won't have time to have dinner before—

MR. STEVENSON: That is right, Judge. May I inquire of Counsel whether he desires to put the other officer on, since his testimony is going to be substantially the same as the first officer? Perhaps your Honor feels that you have enough information—

THE COURT: I feel that I have enough information for a legal question, and then you can brief it if you want to.

MR. BEELER: I feel the same, your Honor. If the Government, you know, doesn't want to put on the second police officer—

THE COURT: No, they—

[158] MR. STEVENSON: That is not what I said, Judge.

THE COURT: They want to put him on but they say his testimony will corroborate the testimony of this officer.

MR. BEELER: I would use the term "will be similar."

MR. STEVENSON: Would you stipulate it would be substantially similar to what this officer stated?

MR. BEELER: I am not sure it is a matter of stipulation.

THE COURT: For your legal theory of the case, do you have enough?

MR. BEELER: I have enough for my legal theory. I think Mr. Stevenson has enough for his. So we are clearly at issue. I don't feel any more need for evidence. I gather Mr. Stevenson doesn't. So I assume both sides rest.

MR. STEVENSON: All right, we will rest, Judge.

THE COURT: All right. Do you want to brief it?

MR. BEELER: We will rest, your Honor. I would request in that case that I be provided a copy of the transcript pursuant to the Criminal Justice [159] act. It is rather difficult briefing what are essentially factual questions without a transcript.

THE COURT: Do you get paid for that, Mr. Betz?

THE COURT REPORTER: I am not sure, your Honor.

MR. BEELER: I can give your Honor the authority, if you would like it.

THE COURT: Do you have to have the transcript in order to answer just a few questions, to define the law on a few questions? Number one, was Mr. Sanchez ever arrested by the Villa Park Police?

Number two, if he was arrested by the Villa Park Police, for what was he arrested by them?

Number three, when and exactly where did the arrest take place?

Number four, if the arrest took place prior to the finding of the gun, was the search of the car an incident of the arrest?

Five, if the arrest did take place prior thereto, for what was he arrested?

Next, if he was arrested for "investigation," [160] is there lawfully under Illinois law such an arrest?

Next, are local police officers authorized upon request of Federal agents to act as agents of the United States in performing arrests?

Next, does Illinois law provide that local police officers may arrest for violations of what are exclusively Federal crimes and are not state crimes or local ordinance violations?

Finally, does the Federal statute contemplate that local law authorize such procedure in the absence of State law accepting the authorization?

Those are your problems.

MR. STEVENSON: Well, Judge, I believe, and respectfully submit, there is one additional one that your Honor did not exactly cover, and that is this:

Should your Honor find that arrest of the defendant occurred at the point he was first encountered by the police, whether your Honor should suppress the testimony of the three passengers on the theory of fruits of the poisonous tree holding that there was an illegal search and seizure.

THE COURT: Yes. Put it this way, and that is, [161] if it is found that that happened, rather than the fruit of the poisonous tree, does the information acquired from the passengers constitute property of the defendant in his possession?

MR. BEELER: Your Honor, I would say the issue should be framed this way: Does the defendant have standing to object to the actions of the police officers which affected the passengers of his car? It is a standing question. I think that is the only proper characterization.

THE COURT: Yes, you can use the fruits of the poisonous tree doctrine, too, if you want to put that in. How long do you want to brief this? You can brief it simultaneously and then exchange briefs and answer each other.

MR. STEVENSON: Since the defendant here clearly has the burden of proof on the motion to suppress, any motion to suppress, I would ask that I be allowed to answer whatever he writes and then—

THE COURT: How long do you want?

MR. BEELER: Your Honor, I am prepared to argue these questions right now.

THE COURT: No, no. I mean to answer them in writing.

[162] MR. BEELER: Well, if we are going to expedite things I think we could argue it now. The facts are fresh. We have done our legal research.

THE COURT: It is 5:30.

MR. BEELER: All right. I would suggest that simultaneous briefs is perfectly acceptable. Whoever the moving party is doesn't have any direct bearing on the order in which briefs should be filed.

MR. STEVENSON: That isn't true, Judge, because in a trial the Government has the burden of proof, therefore, we start and we finish. Here in this proceeding the defendant has the burden of proof so I believe he should start and he can write a reply brief after we answer—

THE COURT: Today is the 12th. Can you get yours in by the 19th? That is one week.

MR. BEELER: I think that I probably—

THE COURT: And you get yours in by the 26th?

MR. STEVENSON: All right.

MR. BEELER: Could I have until the following Monday? I find that I get a lot of my writing done over weekends when I am not bothered by telephone calls.

THE COURT: I am giving you a weekend, this weekend.

MR. BEELER: This weekend is already committed. I am putting out a newsletter, I am writing a reply brief—

[163] THE COURT: All right. That will give the Government until the following Tuesday, which is the 30th.

MR. STEVENSON: Judge, would you start over as to when the brief of the defendant is due because I didn't get that part of it.

THE COURT: The 22nd.

MR. STEVENSON: The 22nd, and then he is to serve us with notice of his brief and we are to write the answer, is that correct?

THE COURT: Yes.

MR. STEVENSON: All right, we have until—

THE COURT: Until the 30th.

MR. STEVENSON: Until the 30th.

THE COURT: Then come in the afternoon of the 31st at 2:30.

MR. STEVENSON: Ruling on the 31st?

THE COURT: At 2:30. I will waive any reply brief.

MR. STEVENSON: All right, Judge.

MR. BEELER: Your Honor, could I have another date for the ruling? On the 31st—

THE COURT: You are difficult.

MR. BEELER: I am terribly sorry but that is why I carry my calendar, to avoid these conflicts ahead of time. On the 31st I have an irrevocable commitment to [164] a much much lower Court, the Traffic Court—

THE COURT: In the afternoon?

MR. BEELER: No. The afternoon would be fine.

THE COURT: I said the afternoon at 2:30.

MR. BEELER: I am sorry. I am terribly sorry.

THE COURT: Yes.

MR. BEELER: 2:30?

THE COURT: Yes. Do you want to check with Immigration and look up that case that I had about four years ago involving the same question, the question of the right to arrest as agents? I don't remember how I came out. The arrest was—do you remember that case?

AN IMMIGRATION OFFICER: I wasn't involved in it but I have spoken with Mr. Farris who was and—

THE COURT: That is the one that happened down at Joliet, wasn't it, or, no, it was Aurora. Could you get me the name of that so I can look it up and see hom I came out?

AN IMMIGRATION OFFICER: I will do my best to find that for you.

THE COURT: Yes. I mean, the prosecutor would want to know that, too. If I was reversed in it I don't want to get reversed again. If I was correct in it, why, it may have some bearing upon this question.

[165] MR. BEELER: I think I should also be informed. I think that Brady vs. Maryland would indicate defense Counsel should be informed.

THE COURT: I am sure the prosecutor will let you know what the case is so you can argue your head off.

MR. BEELER: Will you tell me if you find out?

MR. STEVENSON: Sure, sure.

MR. BEELER: Thank you.

THE COURT: You know what the problem is, and it occurs a great deal; let's take a draft case, for example, where police officers arrest a boy for a traffic violation and, why, then they ask to see his identification—

MR. STEVENSON: Judge, may I call your attention there to paragraph (b) of that particular statute in which it is stated that any law enforcement officer has the power to arrest under the particular statute, and there is no exception indicated as to whether a state passes some kind of enabling statute. Congress says, "If you are a law enforcement officer of any type, you have the power to arrest under this statute."

I did check the annotated of that to find out if there were any cases construing the power of local or state officers to assist or act as agents of the Government,

and there are aren't any cases construing [166] that, Judge, certainly not your own. I would have been the first to bring up your own case to you.

THE COURT: Yes. It is a difficult thing—

MR. STEVENSON: Right, but the statute as it reads, Judge, and I know it is late, but paragraph (b) is very clear; it doesn't allow for exceptions or qualifications, if you are a law enforcement officer you have the power to arrest under that statute as well as, of course—

THE COURT: But you don't have any cases that describe it?

MR. STEVENSON: No, Judge, other than a clear reading of what the words are, and we all know that the words—

THE COURT: The question is whether or not the phrase "all other officers whose duty it is to enforce criminal laws" meant Federal officers.

MR. BEELER: The question is what laws they are empowered to enforce. The statute is not all that clear, contrary to Mr. Stevenson's suggestion.

MR. STEVENSON: Well, if they would have meant all other Federal officers, Judge, it would seem to me a very simple word to include, as they specifically say the IRS or the Immigration Service in the first paragraph [167] of that paragraph (b), and then they say—

THE COURT: We almost had this problem in the Peaches case involving customs officers. That was years and years ago. That was when I was in the U.S. Attorney's office. That was before Judge Perry. There was a written opinion by him in that.

I don't remember how I came out in that other case, I would like to be consistent and I would like not to make a mistake. It may be that I found there was no authority to pick up the telephone and say "arrest these men for us."

On the other hand, if they are arrested for a local violation and they find that there is a Federal violation, the question of whether or not there was probable cause for the arrest on the local violation may not go

over to really—I mean, any more than if they had been thieves. Do you see what I mean?

If there is any fallacy or mistake by the local police in their arrest on the local violation, but there was an arrest on the local violation, and then they turned the man over to the Federal authorities, that is one thing. It is another thing altogether if there is no authority to arrest on a Federal violation and they didn't arrest on a local.

[168] MR. BEELER: Thank you, your Honor.

THE COURT: Well, you all fight it out.

MR. STEVENSON: All right, Judge. I will wait with great expectation the brief of the defendant.

THE COURT: All right.

MR. STEVENSON: Thank you very much.

MR. BEELER: Thank you, your Honor.

RADIO LOG K. S. A. 382: Department of Police, Villa Park, Illinois

From 2300 Hours November 16 To 0700 Hours November 17 19 71

Car No. 130 Mileage:	ON		OFF	Total
Car No. 131 Mileage:	ON		OFF	Total
Car No. 132 Mileage:	ON		OFF	Total
Car No. 134 Mileage:	ON		OFF	Total
Car No. 135 Mileage:	ON		OFF	Total
Car No. .... Mileage:	ON		OFF	Total

TYPES OF TRANSMISSION:
B – Base To Car
C – Car To Base
S – Station To Station
T – Time Test

CAR 130 OPR. # 39-42 NORTH
CAR 134 OPR. # 30 SOUTH
CAR 132 OPR. # 7 ROVING

TIME	OPERATOR	TYPE OF TRANSMISSION	CAR NUMBER	OPERATOR(S)	CAR LOCATION	REFERENCE
******	******				Sgt. W. Zuzulas #7	Demand Pay Off
2258	64				Off. M. King S/O #30	M. King
2246	64				Off. P. Tenuto #39	
2307	64		(2230-0630)		Off. N. Hall #42	
2346	64		(2400-0800)		Mat. J. Bach #61	
###	###	###	###	###	Off. P. Urso	Sick Leave
###	###	###	###	###	Off. R. Miller.	Off Duty
###	###	###	###	###	Off. D. Divis	Off Duty
###	###	###	(0530-1130)		Off. R. ~~Mahoney~~ W. Dosek	Early
			2300-0300		Sgt. R. A. Weiser 11	
0238	61		0300-0700		Sgt. A. Holler 8	A Holler
2232	64	C	130	42	NORTH	10-41
2315	64	C	134	30	ST CHAS / ADDISON	10-38 HS 4374
2316	64	C	134	30	WESTMORE / ST CHAS	10-6 TS HS 4374
2330	64				#2	10-42
2348	64	C	130	39/42	506 N. PRINCETON	10-6 81491
2350	53	C	134	30	B.F. GOODRICH	10-7 TS Buick N. Ent.
2350	53	C	131	20	" "	10-8 " "
2355	53	C	130	39/42	506 N. PRINCETON	10-8 81491
0021	61	C	134	30	9th 83 & Washington	10-6 EK 9365
0030	61	C	134	30	" "	10-8
0040	61	C	130	39/42		10-39 PL 2337 AR
0047	61	C	134	30	Rt. 83 & Washing	10-38 HU 8612
0050	61	C	130	39/42	Grace & North	10-38 LH 2329
0057	61	C	134	30	9th-83 & Washing	10-37
0054	61	C	130	39/42	Grace & North	10-38 LH 23
0055	61	LH	2329		Reported Wheelwalk Parking	5535 Lorraine
0109	61	C	134	30/11		11-59 to Sta-2
0119	61	C	130	39/42	Grace & North - Elm.	10-6 Yellow Cab
0119	61	C	130	39/42	" "	10-8
0134	61	C			130 - 11	Client 10-39
0139	61	C	134	30/11		10-39 Comp
0145	61	C	134	30/11	Denny's	10-7
0212	61	C	132	30/11		10-8
0228	61	C	132	39/42	North	10-8

TIME	OPERATOR	TYPE OF TRANSMISSION	CAR NUMBER	OPERATOR(S)	CAR LOCATION	REFERENCE
					130 39-42 D 134 30 S 132 11 R	
2230	61	C	130	39 42	North & Addison	10-8
2233	61	C	130	34 42	" "	10-6 CV4433 no Stud
2235	61	CV4433-			Pasqual Sanchez 9727 So. Cue, 2 Chgo. '69 Pont	
2237	61	C	132	11	North & Addison	10-23
2242	61	C	132	11	" "	10-59 2 Subj.
2242	61	C	130	39 42	" "	10-59 "
2246	61	C	130	39 42	" "	10-59 Complete
3247	42			61	Chow	10-7
3447	42	C	134	30	Flower City	10-24 RJ630 10-29
3448	42	B	134	30	Randall Rexond 630 N. Stone, CA Grange Pk, Ch DOD Cp.	
3449	42	B	134	30	NO HIT LOS/NCIC	
0427	61				#11	10-42
0429	61	C	134	30	Garage	10-7
0450	61	C	134	30	"	10-8
0454	61	C	132	8	"	10-7
0513	61	C	132	8	"	10-8
0520	61	C	134	30		10-28 KT 85-84
0522	61	KT-8584	Sylvester	J. Mullen, 2 E. Harrison, VB '62 Chevy		
0522	61	C	130	30	Wisconsin & North	10-6 571-403
0526	61	C	130	42	"	10-8
0558	61	C	132	H8	J.C. Penney's	10-6 ND4429
3612	61	C	132	H8	"	10-8
0617	61	HS-4974	Mary	J. Mitchell J. Boyce, 905	Deertrail, Lombard '65 Cent C.	
0637	8	C	138	34	~~Loss Rest~~	11-28 PH 8902
0637	8	C	139	34	LOSS NCIC REST	10-23
0640	61	PH 8902-	Sharon K. Hilberg, 336 E. Central, VB '50 Chev 4S			

U.S.A. — 7th C. suit

DEC 5 - 1972

Clerk

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EXCERPT OF GOVERNMENT'S BRIEF ON APPEAL, FILED OCTOBER 20, 1972

ARGUMENT

I.

THE BRIEF QUESTIONING OF THE PASSENGERS IN DEFENDANT'S CAR CONSTITUTED A VALID INVESTIGATORY STOP, AND NOT AN ILLEGAL SEARCH.

The government assumes, for purposes of this appeal, that the questioning of the passengers in defendant's car constituted a search of the car to which defendant has standing to object. The government also concedes that the testimony of witnesses discovered during an illegal search can be suppressed as to a person having standing to object to the search. The issue presented to this Court is whether the questioning of the passengers while they were in defendant's car constituted an illegal search, or whether it was a proper and valid investigatory stop.

The government contends that the trial court erred when it ruled that police inquiry should have stopped after defendant, the driver of the car, produced a valid driver's license and it was ascertained by radio that the car belonged to him. In the circumstances of this case, it was entirely proper for the officers to additionally question the passengers in the car.

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the nation's highest court ruled that police have authority to investigate suspicious persons and make reasonable detentions under circumstances constituting less than probable cause for arrest. This notion of police encounter not amounting to an arrest has been extended by the Supreme Court in its last term. *Adams* v. *Williams*, 407 U.S. 143 (1972). The Adams case is important because of many factors similar

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EXCERPT OF GOVERNMENT'S BRIEF ON APPEAL, FILED JANUARY 9, 1973

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regarded the issue to be what facts were available to the officers when they first surrounded the car, and before the window was rolled down. Thus, the "specific articulable facts" relied upon by the officers in that case consisted only of an out-of-state license plate on a car parked outside of a pool hall at an hour when the pool hall was open. Manifestly, the facts in this case are stronger than those in the *Nicholas* case.

Defendant in his brief relies upon the actions of the officers in arresting defendant and his passengers and transporting them to the police station (D. Br. 14, 24). In so doing, defendant overlooks both what is being suppressed in this case, and his lack of standing to object to the transportation of his passengers to the police station. See appellant's brief, Argument II. The issue in this case is whether the questioning of the passengers in the defendant's car was proper, for this is the only "search" to which he has standing to object, and is from this that the testimony of those passengers, the thing sought to be suppressed, flows.

II.

THE QUESTIONING OF DEFENDANT'S PASSENGERS DID NOT GO BEYOND THE SCOPE OF THE REASONABLE INQUIRY PERMITTED BY *TERRY*.

As defendant points out, this is not a case which involves a "frisk" (D. Br. 13). This case involves only the asking of those reasonable questions which, under *Terry* v. *Ohio*, *supra*, are the justification for the investigatory stop in the first place.

It is important in the resolution of this case to understand that *Terry* v. *Ohio*, *supra*, involved more than a mere frisking of a suspect for weapons. The so-called "protec- • • •

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SUPREME COURT OF THE UNITED STATES

No. 73-820

UNITED STATES, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

ORDER ALLOWING CERTIORARI—Filed June 17, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1974 554818 24

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-820

UNITED STATES OF AMERICA, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Pascual Guana-Sanchez, moves the Court for an Order permitting him to proceed in this Court in forma pauperis, pursuant to the provisions of Title 28 United States Code, Section 1915, and Rule 53 of this Court, and in support thereof states the following:

1. Respondent has filed a financial affidavit on Criminal Justice Act Form 23 in the United States District Court for the Northern District of Illinois.

2. Joseph Beeler, Esquire has been Respondent's court appointed counsel throughout the proceedings below, and has been appointed by the United States Court of Appeals for the 7th Circuit to represent Respondent in the preparation of Respondent's Memorandum in Opposition to the Petition for a Writ of Certiorari.

3. Joseph Beeler, Esquire, is not in Chicago, and is not available to sign this Motion.

WHEREFORE, Respondent prays that he may have leave to proceed in this Court in forma pauperis.

Donald J. Martin,
Attorney for Respondent
512-14 Swede Street
Norristown, Pennsylvania 19401

COMMONWEALTH OF PENNSYLVANIA
: ss
COUNTY OF MONTGOMERY

DONALD J. MARTIN, being duly sworn according to law, deposes and says that he is an attorney for the Respondent, and has assisted in the representation of Respondent in the courts below as a Federal Defender Program Law Student Intern, and that the facts set forth in the foregoing Motion are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed
before me this 25th day
of January, 1974.

Donald J. Martin

ANN [illegible]
Notary Public, Montgomery Co., Pa.
My Commission Expires March 24, 1977

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SUPREME COURT U.S.

NO. 73-820

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOSEPH BEELER,
c/o Federal Defender Program, Inc.
219 South Dearborn Street
Chicago, Illinois 60604

DONALD J. MARTIN
512 Swede Street
Norristown, Pennsylvania 19401

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-820

UNITED STATES OF AMERICA, PETITIONER

V.

PASCUAL GUANA-SANCHEZ

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals is reported at 484 F. 2d 590.

STATEMENT OF THE CASE

1. The statement of this case as set forth in the Government's Petition for a Writ of Certiorari contains significant omissions and misinterpretations of fact, so it is necessary for Respondent to set out a complete statement of this case. The relevant facts, as developed in the hearing on the Motion to Suppress, the opinion of the District Court and the opinion of the Court of Appeals are as follows:

Pascual Guana-Sanchez (hereinafter referred to as "Respondent") is charged with knowingly and unlawfully transporting three Mexican aliens within the United States (only "within" the United States, and not "into" as the Government declares, Pet. at 3[1]), knowing or having reason to believe that the aliens had made their last entry into the United States within the last three years, in violation of the Immigration

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1 The Government's Petition for a Writ of Certiorari is cited as "Pet."

and Naturalization Laws of the United States. 8 U.S.C. §1324(a)(2). The detention and subsequent arrest of Respondent occurred on November 17, 1971, and he was indicted by the January, 1972 Grand Jury. Respondent timely moved to suppress evidence obtained as a result of unlawful police conduct; an evidentiary hearing was held on May 12, 1972; and, on June 8, 1972, the District Court ruled. After considering the evidence and the Briefs of the parties, the District Court delivered an oral opinion which is set out as Exhibit "D" in the Government's Petition, and entered an order granting the Respondent's motion. On June 23, 1972, the Government filed its Notice of Appeal, under 18 U.S.C. §3731. The case was not argued before the Court of Appeals until January 23, 1973. That Court issued its opinion on July 18, 1973, and denied the Government's Petition for a rehearing on August 6, 1973. The Government's Petition for a Writ of Certiorari was filed in this Court more than two years after the incident in question.

At the outset of the hearing in the District Court, the parties stipulated that the police officers had acted without a warrant for arrest and search and knew of no such warrant. The only witness called was Officer Pat W. Tenuto of the Villa Park Police Force. At the conclusion of Tenuto's testimony, it was asserted that the testimony of his partner, Officer Norman Hall, would be substantially similar to the testimony already received, and both parties rested.

At approximately 2:30 a.m. on November 17, 1971, Officer Tenuto and his partner, Hall, on routine traffic and patrol duty, were running radar and had made a traffic stop at the intersection of North and Addison Roads in Villa Park.

One of the officers then observed a station wagon parked in a curbed, but unpaved, cut-off connecting the two streets on the northeast corner of the intersection. The headlights and interior dome lights were lit and the officers could see three or four persons inside. The driver, later identified as the Respondent Pascual Sanchez, was studying what appeared to the officer to be a road map.

The officers believed that the driver was lost, radioed a message to the police station that they were going to the aid of a motorist in distress, and gave the dispatcher the Illinois license number of the stationwagon after driving to the other side of the intersection. They pulled their marked patrol car near the stationwagon, got out of the car and approached Respondent's vehicle. Officer Hall proceeded to the driver's side and Officer Tenuto to the passenger's side. Both officers were in uniform, each had a pistol, handcuffs, extra ammunition and a can of Mace on his belt, in full view.

Officer Hall asked Respondent if he was having trouble, and was told that he was looking for a restaurant on North Avenue which was owned by a friend. If this could not be located, then he was looking for another restaurant, and displayed a match book advertising a restaurant in an adjacent town. One of the officers returned to the squad car to find out for Sanchez if the restaurant was open. It was not, and an inquiry of some neighboring towns revealed no other available restaurants open at that time.[2]

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2 The dissenting judge in the Court of Appeals has accepted the Government's assertion that Respondent's story did not check out. 484 F. 2d at 593, Pet. at 6a. This is not a fact found by the District Court, and the police officer never testified that his suspicions were aroused. The Government's conclusion, taken in its most favorable light, is second-guessing at best and it does not necessarily follow that if the restaurant was closed, Respondent was being dishonest when he said he was looking for it.

The officer returned with this information, and then Hall requested Respondent to produce identification. He complied by handing the policeman his driver's license. It appeared to be an entirely valid Illinois driver's license, and furthermore, Respondent's name and address on the driver's license corresponded to information that the officers had just previously received as a result of a radio check of the Illinois license plate of his car. The radio report verified the name and address of the owner, and that the car was not reported as stolen or wanted in connection with any crime. Having completed his inspection of the driver's license, Officer Hall returned it. At this juncture (and even later), the officers admittedly knew of no felonies which the occupants of the car had committed and had no charges to bring against Respondent. The District Court specifically found that "...at this point there were no grounds stated to infer that a crime was being committed, had been committed, or was about to be committed". (Pet. at 17a) Nevertheless, according to Officer Tenuto's testimony, if Respondent had driven away immediately after the license had been returned to him, the officers would have gotten into their car to pursue and detain him again.

Despite the satisfactory driver's license and license plates, Officer Hall continued the questioning and demanded some form of tangible identification from the three passengers. Officer Tenuto's testimony revealed that it was the standard operating procedure of the Villa Park Police to request identification from all persons in a parked vehicle at night, and, moreover, if they were unable to produce satisfactory proof of identity, to bring them to the police station so that their identity could be verified and determined whether they might be "criminals".

After the Respondent translated this request, one of the passengers produced a card written in a foreign language and handed it to Tenuto. The two passengers in the rear seat were not able to produce any identification. Consequently, the officers radioed their sergeant who was in another Villa Park police car and he drove to the scene. After consultation with their sergeant, Respondent and his passengers were taken to the police station.

When they arrived at the police station, they were brought inside. This was followed by a telephone conversation with an officer of the Immigration and Naturalization Service in Chicago. The Immigration Officer on duty spoke with the three passengers and then told the Villa Park police that the passengers were probably aliens illegally within the United States. He requested that they and Respondent be held until officers of the Immigration and Naturalization Service could come to Villa Park the next morning.

2. The District Court delivered an oral opinion on June 8, 1972, in which it held that once the police officer returned the driver's license to Respondent no grounds had been stated to infer that a crime had been, was being, or was about to be committed. As the District Court stated:

> "Whatever proper investigative suspicions they may have had earlier were dispelled at this point, and thus it was unjustified to hold the vehicle any longer, or its occupants, or to interrogate the passengers." Pet. at 19a.

The Seventh Circuit did not focus clearly on the point in time at which it considered the Fourth Amendment intrusion to have occurred, but it specifically referred to this finding, stating that:

> "Three steps can be delineated from the facts before us: (1) the original interrogation ending with the determination of the

> validity of Sanchez's driver's license and his ownership of the car; (2) the period beginning with the return to Sanchez of his license and of the restraint upon his movement thereafter; and, (3) the period beginning with the trip to the police station.
>
> . . . After the hearing, the district judge read his findings of fact and conclusions of law in which he decided that the police officers had a reasonable suspicion justifying their interrogation, in the first step of the police activity, but there was no probable cause to justify their activity thereafters." [Footnote omitted] 484 F. 2d at 591, pet. at 2a-3a.

Nowhere did the Court of Appeals disagree with this finding.

REASONS FOR DENYING THE WRIT

The Government has attempted to make this case something which it is not. The Government's Petition states at page 5 that the majority of the Court below determined that the interrogation of the passengers while in Respondent's automobile was proper. The majority opinion (Petition at 3a, 484 F. 2d at 591) states that the District Judge properly decided that the police officers had a reasonable suspicion justifying their initial interrogation, but that there was no probable cause to justify their activities thereafter. The Court of Appeals never stated that the interrogation of the passengers was proper.

The Government is creating semantic confusion in its attempt to frame an issue. It speaks of an arrest when the issue is the unlawful detention of Respondent. When it states the issue (Pet. at 7-8) it uses the word "arrest" or "arrested" ten times in a single paragraph. In that paragraph the Government uses the example of Respondent being arrested alone not giving rise to tainted testimony, and, conversely, the arrest of the passengers alone not giving rise to a right to suppress their testimony. The example is good, but it is not this case. The police had no grounds to detain Respondent, and yet they did

so unlawfully, in order to question the passengers.

The Court of Appeals did use the term "arrest" in referring to the violation of Respondent's rights. The government seizes on this to avoid the consequences of its concession below that the questioning of the passengers was a search to which Respondent had standing to object, and that if this search was illegal the testimony of these witnesses could be suppressed by a person having standing to object. (Pet. at 6, n.2) The Respondent was "seized" and his automobile was "seized" by the police in order to question the passengers to conduct a search of Respondent's automobile. This Court has rejected such semantic distinctions. In Terry v. Ohio, 392 U.S. 1, 16 (1968) this Court stated:

> "Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden 'seized' Terry and whether and when he conducted a 'search'. There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the stationhouse and prosecution for crime -- 'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person . . . ." [Footnote omitted]

And in Davis v. Mississippi, 394 U.S. 721, 726-727 (1969) similar semantic distinctions were also rejected:

> "It is true that at the time of the December 3 detention the police had no intention of charging petitioner with the crime and were far from making him the primary focus of their investigation. But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject

> unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions." We made this explicit only last Term in Terry v. Ohio, 392 U.S. 1, 19 (1968), when we rejected "the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search." [Footnote omitted]

The District Court opinion fixes the time of the Fourth Amendment intrusion. The Trial Judge found that after the police had determined that the car was not stolen, that it was owned locally and that Respondent had a valid driver's license, they were unjustified in holding the car and its occupants any longer. The police testified, however, that Respondent was not free to leave, and that he would have been pursued and recaptured if he tried to drive away. The District Court found that Respondent had been "arrested" at the time his driver's license was returned and immediately before the interrogation of his passengers was begun.

In addition, the Government has alluded to the fact that "the officers did not enter the car, the passengers were in plain view, and Respondent had no property right or other legally protected interest in their continued presence in the car". (Pet. at 6, n. 1). This type of argument is reminiscent of the one rejected in Katz v. United States, 389 U. S. 347 (1967).

> "The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been had he remained outside. But what he sought to exclude when he entered the booth was not the intruding eye -- it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. . . ." 389 U.S. at 353.

Respondent does not contest the fact that the passengers were in "plain view". Naturally they could be seen, but at best all that could be seen was that the passengers were of Latin descent, and there is not even testimony in the record to support the view that the officers could observe the racial characteristics of the car's occupants. The officers could not learn by simple observation that they were aliens unlawfully within the United, their last previous entry into the United States having been within the past three years. This could only be learned by interrogation, and any reasonable suspicion that this was the case could have arisen only after the rights of Sanchez were violated by the police detention of him for the interrogation of these men.

In short, Respondent did have a legally protected interest -- the right not to be subject to unlawful detention and search.[3]

At no point in these proceedings has Respondent attempted to assert the right of the alleged Mexican aliens discovered in his automobile, and any suggestion to the contrary by the Government is a misinterpretation of the decisions of two courts. Respondent's position has always been that

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3 The decision below is also in accord with the decisions of this Court. Henry v. United States, 361 U.S. 98 (1959), involved a Motion to Suppress Evidence obtained as a result of an unlawful search and seizure. There, the FBI, acting on information which was not on the record, waved the defendants' car to a stop. The Government conceded, and this Court agreed, that the arrest took place when the FBI agents stopped the car.

> "...when the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case was complete. . . ." 361 U.S. at 103.

See also Terry v. Ohio, 392 U.S. 1 (1968); United States v. Nicholas, 448 F. 2d 622 (8th Cir. 1971).

after his driver's license was returned to him, the police had no right to detain him and his automobile any longer. Interrogation of the passengers in Respondent's automobile, for which the Respondent was detained ("arrested" if you will), constituted a violation of the rights guaranteed to him under the Fourth Amendment to the Constitution of the United States. The government has conceded that the interrogation of the passengers in Respondent's automobile constituted a search of the car to which he has standing to object. They have also conceded that the testimony of a witness discovered during the course of an illegal search can be suppressed. (Petition at 6, n. 1) The only issue was the legality of police conduct. The opinion of the Court of Appeals, when read in conjunction with that of the District Court, has upheld the contention of the Respondent. The police did not have the slightest grounds to suspect that they were aliens unlawfully within the United States until they were unable to produce identification. This information was obtained as a direct result of Respondent's unlawful detention. In short, the Respondent could not be less concerned with any violation of the rights of the passengers in his automobile -- their testimony and their physical presence is evidence against him and was obtained by virtue of an unlawful detention of him and his automobile, and it is this evidence against him which has been ordered suppressed.

Accordingly, the question presented for review and the government's argument are irrelevant to the opinion below. This Court should not consider questions not decided in the courts below. See, United States v. Fleischman, 339 U. S. 349, 365 (1950) and Owens v. Union Pacific R. Co., 319 U. S. 715, 724-725 (1943), where this Court refused to entertain questions not decided in the lower courts. The Government asserts that the decision of the Court of Appeals presents

an important question of Federal law which was decided contrary to the decisions of this Court, and that there is now a conflict among the circuits. This is simply not the case. The Respondent has not challenged the arrest of the passengers. He clearly has standing to assert the violation of his own rights, and the cases cited by the government do not conflict with the decisions of the courts below.

Alderman v. United States, 394 U.S. 165 (1969) held that the Fourth Amendment rights of the petitioner were not violated by government electronic eavesdropping on premises which were not theirs, of conversations to which they were not a party. Here, Respondent and his vehicle were detained by the Villa Park Police, and as a direct result the police acquired information which led them to suspect that the passengers were aliens illegally within the United States. Nor are Jones. v. United States, 362 U.S. 257 (1960) or Simmons v. United States, 390 U.S. 377 (1968), in point. Both cases have language to the effect that Fourth Amendment rights are personal, a proposition with which the Respondent, the District Court and the Court of Appeals agree.

In Brown v. United States, 411 U.S. 223 (1973), the defendants were charged with transporting, and conspiracy to transport, stolen goods in interstate commerce. On the basis of defective warrants, the police searched a warehouse where they had seen the defendants place goods. The defendants alleged no possessory interest in the warehouse or the goods seized, and were not on the premises at the time of the search. Possession was not a central element of the offense. This Court held that the petitioners in Brown had no standing to assert the rights of the owner of the warehouse. Respondent here owned the vehicle detained and was himself detained, and asserts the rights of no one but himself.

Similarly, the other cases cited by the government in support of the proposition that this case was decided contrary to the decisions of this court and that an important question of Federal law is here involved are irrelevant.

The government also asserts that the decision in this case conflicts with the decisions of other circuits. Rather than being in conflict, the decision is in complete harmony with those of other circuits which have ruled on the point, and with many state court decisions.

United States v. Humphrey, 409 F. 2d 1055 (10th Cir. 1969) is relied upon heavily by the government in suggesting a conflict among the circuits. In that case, Humphrey was a passenger in an automobile driven by Emery. There had been a traffic violation, and the police officers stopped Emery's vehicle, ordered him out and searched his person. As a result of evidence found on Emery's person, the vehicle was searched and evidence was found which incriminated the defendant. There is no indication that the defendant complained of his own detention during the search of Emery. Although the court held that the initial search of Emery was unreasonable and, therefore, invalid, its results made the search of the vehicle reasonable and Humphrey was held to be without standing to complain. Humphrey's rights were never violated, as were those of Respondent here.

The Government's Petition is predicated on an alleged conflict in the Circuits which has been demonstrated to be a conflict that does not exist in the opinions below, but which was manufactured by the Government. Moreover, even if the Government's interpretation of the Seventh Circuit's opinion is correct, there is still hardly a conflict among the Circuits worthy of this Court's consideration. The Seventh Circuit has not pretended to give Respondent third-party standing or to depart from the accepted law in this regard. The best the Government has been able to state is that "inherent in the court

of appeals' affirmance of the suppression order, therefore, is a determination that Respondent may be permitted to obtain exclusion of evidence derived from the arrest of his passengers". (Pet. at 8). Thus, to find a conflict among the Circuits, the government must search for one that is inherent, rather than point out one that is explicit. Furthermore, previous decisions of the circuit indicate that it is well aware of the requirement for standing. [United States v. Chaidez-Castro, 430 F. 2d 766 (7th Cir. 1970); United States v. Preston, 463 F. 2d 544 (7th Cir. 1972)], and it is obvious that the Seventh Circuit in the future will follow the teachings of Alderman and Brown, and require an invasion of defendants' rights before suppressing evidence offered against them.

Being generous to the Government's attempts to make this case something it is not, we have, at best, a conflict within the Seventh Circuit, and not among the circuits.[4]

In addition to the foregoing reasons, the Respondent wishes to assert another reason for denying the writ. The unlawful search took place over two years ago. The indictment was filed on February 1, 1972, and, as previously noted, the District Court granted Respondent's Motion to Suppress Evidence on June 8, 1972. The Government filed its Notice of Appeal on June 23, 1972, and on July 30, 1972 and August 30, 1972, the Government applied for and received thirty day extensions of time to docket its appeal.

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[4] In a gratuitous Footnote (Pet. at 11) the Government criticizes the exclusion of the live testimony of a witness discovered in the course of a Fourth Amendment intrusion. Since that issue is not before this Court, Respondent will only note in passing the overwhelming authority in support of the proposition. United States v. Tane, 329 F. 2d 848 (2d Cir. 1964); Smith v. United States, 344 F. 2 545 (D.C. Cir. 1965); Williams v. United States, 382 F. 2d 48 (5th Cir. 1967); United States v. Marder, 474 F. 2d 1192 (5th Cir. 1973); United States v. Resnick, 483 F. 2d 354 (5th Cir. 1973); People v. Albea, 2 Ill. 2d 317, 118 N.E. 2d 277 (1954); Abbot v. United States, 138 A. 2d 485 (D.C. Mun. Ct. App. 1958); People v. Mickelson, 49 Cal. 2d 448, 30 Cal. Rptr. 18, 380 P. 2d 658 (1963); State v. Rogers, 27 Ohio Op. 2d 105, 198 N.E. 2d 796 (C.P. 1963); Commonwealth v. Cephas, 447 Pa. 500, 291 A. 2d 106 (1972); Nicholas v. State, 14 Cr. L. 2084 (Tex. Ct. Crim. App. Sept. 25, 1973).

On December 27, 1972 the Court of Appeals, on motion of the government, granted an extension of time to file reply briefs. After the Court of Appeals filed its decision, the government was granted an additional thirty days to file their Petition for Rehearing. The government has also applied for and received an extension of time from this Court to file its Petition for a Writ of Certiorari. (Admittedly, Respondent has also has been granted a few continuances.)

On October 31, 1972 Respondent filed its assertion of a speedy trial right in the District Court, and on October 11, 1973, after the mandate of the Court of Appeals issued, Respondent filed a Motion to Dismiss because of denial of a speedy trial, and a Motion for Immediate Setting of a Date for Trial. The District Court has not ruled on these Motions, but they will be asserted by Respondent on remand.

The government took this appeal under the provisions of 18 U.S.C. §3731, which provides in part that:

> "The appeal in all such cases shall be taken within thirty (30) days after the decision, judgment or order has been rendered and shall be diligently prosecuted." [Emphasis added]

These extensions of time hardly indicate diligent prosecution, and if this Court should grant the writ, it may well be another year before this case is remanded to the District Court for trial or other disposition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January, 1974

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-820

UNITED STATES OF AMERICA, PETITIONER

V.

PASCUAL GUANA-SANCHEZ

AFFIDAVIT OF SERVICE

COMMONWEALTH OF PENNSYLVANIA:

SS.

COUNTY OF MONTGOMERY:

DONALD J. MARTIN, an attorney for the respondent, certifies pursuant to Rule 33(2)(a) of the Rules of the Supreme Court of the United States that all parties required to be served have been served and specifically that he mailed one copy of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari to all counsel of record on January 23, 1974 by placing said copy in an airmail postage prepaid envelope and by depositing such envelope in a United States Postal Service Mailbox at the Norristown, Pennsylvania Post Office, said envelope being addressed as follows:

Hon. Robert H. Bork
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Donald J. Martin

Sworn to and subscribed
before me this day
of January A.D., 1974.

Notary Public

ANNE W. POWELL, Notary Public
Norristown Boro, Montgomery Co., Pa.
My Commission Expires March 24, 1977

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-820

UNITED STATES OF AMERICA,

Petitioner,

v.

PASCUAL GUANA-SANCHEZ,

Respondent.

MOTION TO DISMISS THE WRIT ON ACCOUNT OF MOOTNESS

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Respondent.

MOTION TO DISMISS THE WRIT ON ACCOUNT OF MOOTNESS

Respondent, Pascual Guana-Sanchez, by his attorneys, Joseph Beeler and Donald J. Martin, respectfully suggests to this Court the probability of mootness of this cause and respectfully moves to dismiss the writ of *certiorari* or, in the alternative, to remand the case to the District Court for factfinding and the granting of appropriate relief. In support of his motion Respondent states as follows:

1. The respondent-defendant was arrested in November of 1971 in the company of three other persons.

The indictment, which was not returned until three months later, alleges that the three persons who were being transported by the defendant were unlawfully entered aliens.

2. On February 28, 1972, Joseph Beeler was appointed to represent the defendant. A motion to suppress evidence was filed on March 17, 1972. On March 27, 1972, the Court (the Honorable James B. Parsons, Judge Presiding) set the date of April 17, 1972, for a hearing on defendant's motion, which date was subsequently reset on the government's motion to May 12, 1972. On that date the hearing was held and on June 8, 1972, the District Court granted the defendant's motion to suppress evidence.

3. The government on June 23, 1972, filed its notice of appeal pursuant to 18 U.S.C. §3731 which provides that such interlocutory criminal appeals ". . .shall be diligently prosecuted", but its brief on appeal was not filed until October 20, 1972. The government also requested and received an extension of time to file its reply brief. The case was argued before the Court of Appeals on January 23, 1973 and decided July 18, 1973. No stay of mandate was sought by the government and the mandate issued. The government requested and received an additional 30 days extension of time to file its petition for rehearing and the rehearing was denied on September 25, 1973. Following another extension of time, the government's petition for a writ of certiorari was filed on or about November 23, 1973. Respondent's Memorandum in Opposition, at 13-14, pointed out the delay and the defendant's previous assertion of his speedy trial rights. On June 17, 1974 this Court granted the petition. On August 13, 1974 the government filed an untimely brief on the

merits as petitioner. The brief on the merits for defendant as respondent is currently due October 16, 1974.

4. Meanwhile, somewhat after he had been appointed, Mr. Beeler had made a request of Mr. Michael D. Stevenson, the Assistant United States Attorney assigned to the case, for information as to the whereabouts of the three alleged aliens or for permission to interview them. Mr. Stevenson declined this request and stated that they could be examined at trial. Afterwards, on October 31, 1972, the defendant served and filed a document formally asserting his right to a speedy trial and objecting to any further continuances in this case. At numerous status calls in the District Court counsel urged that the case be set for trial but the Court expressed its belief that it had no jurisdiction while the case was on appeal.

5. Finally, on or about August 23, 1974, newly assigned District Court counsel (Mr. Beeler having left the staff of the Federal Defender Program of Chicago) appeared in Judge Parsons' absence before the Northern District of Illinois emergency judge (The Honorable Prentice Marshall) and presented a Motion to Produce Witnesses, a copy of which is attached hereto as Exhibit A.[1] Said motion pointed out that the mandate had issued, and asserted that "[i]t is essential to proper pretrial preparation that access be had to the [three aliens] for the purpose of interviewing, but the defendant has no information as to their whereabouts." Expressing the view that the matter was not of an

[1] Exhibits A through E were attached, so labeled, to a later Motion to Dismiss the Indictment. A copy of that Motion and its exhibits is attached hereto to Group Exhibit I.

emergency nature, Judge Marshall continued the motion for hearing before Judge Parsons on September 12, 1974.

6. The day immediately following the appearance before the emergency judge, the government filed in the Court of Appeals a motion to recall the mandate stating a single ground for the motion: "to preclude further proceedings in the district court." On August 30, 1974, the Court of Appeals granted the government's motion and recalled the mandate. A copy of said Order is attached hereto as Exhibit B.

7. On September 12, 1974, when the defendant's motion to produce witnesses was presented to Judge Parsons, the action of the Court of Appeals was argued by the prosecutor (Mr. Stevenson) to have deprived the District Court of jurisdiction to entertain the motion. At that September 12 appearance the prosecutor also declined to state whether or not the three alleged aliens in this case were presently within the continental limits of the United States or were without and beyond the reach of the subpoena power of the Court and the parties. The Court did not reach the question of its jurisdiction but nonetheless denied the defendant's motion.

8. Subsequently defendant served and filed (1) a Motion to Dismiss Indictment and supporting memorandum and (2) a Motion of Defendant for Discovery or, Alternatively, For Immediate Trial and on September 18, 1974, appeared before Judge Parsons on the motions. The Motion to Dismiss Indictment, a copy of which is attached thereto as Group Exhibit 1,[2] stated these reasons:

[2]The attachments to the Motion to Dismiss Indictment as it was filed in the District Court remain designated as originally labeled, i.e., as Exhibits A through E.

> "...(1) the three aliens named in the indictment, whose presence is constitutionally required for the trial of this cause, have been removed from the United States by the plaintiff or have been allowed to depart voluntarily, in violation of the rights of due process of law, to confront witnesses, and to compulsory process as guaranteed by the Fifth and Sixth Amendments to the United States Constitution; and (2) the inordinate delay from the time of the defendant's arrest in 1971, caused principally by the government's actions, and in the face of the defendant's demand for trial in October of 1972, is in violation of the right to a speedy trial as embodied in the spirit and the letter of this district's Plan to Implement Rule 50(b), Rule 48(b) of the Federal Rules of Criminal Procedure, and the Sixth Amendment."

Among the grounds asserted in support were the government's efforts to prevent the interviewing of witnesses or even inquiry as to the probability of mootness and the demonstrable hardship which the pendency of this criminal prosecution has imposed upon defendant and his family. The Memorandum in Support of Defendant's Motion to Dismiss Indictment, a copy of which is attached hereto as Exhibit II, elaborates the legal basis for the requested relief citing *United States v. Cox*, 475 F.2d 837 (9th Cir. 1973) and *United States v. Clay*, 481 F.2d 133, 137 (7th Cir. 1973) in support of the speedy trial point and *United States v. Mendez-Rodriquez*, 450 F2d 1 (9th Cir. 1971), *inter alia*, in support of the witness point. The Motion of Defendant for Discovery or, Alternatively, for Immediate Trial, a copy of which is attached hereto as Exhibit III, seeks a variety of information about the aliens and their present whereabouts including: "7.

What information exists to support the belief that said aliens are now subject to the process of this Court, to extradition for purposes of testimony at the trial of this cause, or that their presence at trial otherwise can be assured." The stated purpose of the discovery motion was to illuminate the issues in defendant's Motion to Dismiss Indictment and to prove the mootness of this cause, citing *Walling v. James v. Reuter, Inc.*, 321 U.S. 671, 677 (1944) and *Mills v. Green*, 159 U.S. 651 (1895) as examples of mootness. The prosecutor (Mr. Stevenson) opposed both motions on grounds that the mandate had been recalled and asked the District Court to deny the defendant the right to file the motions. The Court, however, permitted filing of the motions but then denied the motions, remarking in the process:

> "THE COURT: Mr. Decker [the defense counsel], I have had a chance to review your motion. I might indicate that you argue very well, with a degree of brilliance, and I think you owe it to your client to at least make a record. We operate upon what I find to be a tradition, not upon a rule, that when the matter is before the Appellate Court or before the Supreme Court that the district court will take no action in it whatsoever.
>
> "Now, what your motion does is attack really that tradition and I think that you should have a right to make your record on it."

A copy of the Court's minute order denying the motions is attached hereto as Exhibit IV.

9. Defendant-respondent asserts upon information and belief that the three alien witnesses whose testimony the District Court has suppressed, have been allowed by the government to melt back into the populace of Mexico, that, if their whereabouts were

known, these witnesses nonetheless would be beyond the subpoena power of the Court and would not be subject to any treaty of extradition. See *United States v. Mendez-Rodriquez*, 450 F.2d 1 (9th Cir. 1971). In other words, the question before this Court–the correctness of the District Court's suppression decision –has become hypothetical; there is no real case or controversy. Defendant further asserts that the government's behavior below confirms this contention. Mr. Justice Rehnquist has recently reminded us that "we may not as judges [or lawyers] ignore what we know as men, . . ." *United States v. Maze*, ____ U.S. ____ , 94 S.Ct. 645, 650 n.7 (1974). We regard it as too plain for further comment that the three aliens are no longer subject to United States jurisdiction and/or compulsory process; that the government's recent action in the Court of Appeals was designed to frustrate any inquiry as to mootness; and that the same is true of the prosecutor's refusals on September 12 and September 18 to disclose facts in the District Court regarding the three aliens.

10. The foregoing demonstrates that this case is moot, or, in the alternative, that the plaintiff is at least called upon to answer the allegation of mootness lest the Court render an opinion where there is no case or controversy. Defendant respectfully suggests that the appropriate procedure is either to dismiss the writ for mootness or to remand to the District Court where the plaintiff may answer and appropriate factfinding can be conducted. See *DeMarco v. United States*, ____ U.S. ____ , 94 S.Ct. 1185, 39 L.Ed2d 501 (1974) (footnote).

11. More importantly to defendant, the foregoing also demonstrates that he has been denied a speedy trial

and basic rights of trial preparation. The "tradition" against taking action while cases are on interlocutory review evidently tying the hands of the District Court, *contra United States v. Cox*, 475 F.2d 837 (9th Cir. 1973), leaves the defendant with no present recourse. Defendant therefore urges that the remand order also enable the District Court to hear defendant's several other motions for relief.

Respectfully submitted.

JOSEPH BEELER
750 N.E. 61st Street
Miami, Florida 33137
(305) 751-3808

Attorney for Respondent

DONALD J. MARTIN
One Montgomery Plaza
Swede and Airy Streets
Norristown, Pennsylvania 19401
(215) 277-1700

October 11, 1974.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	No. 72 CR 50
	)	
PASCUAL GUANA-SANCHEZ	)	

MOTION TO DISMISS INDICTMENT

The defendant, PASCUAL GUANA-SANCHEZ, by his attorneys Thomas D. Decker, and Federal Defender Program, moves to dismiss the indictment for the reasons that (1) the three aliens named in the indictment, whose presence is constitutionally required for the trial of this cause, have been removed from the United States by the plaintiff or have been allowed to depart voluntarily, in violation of the rights to due process of law, to confront witnesses, and to compulsory process, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution; and (2) the inordinate delay from the time of the defendant's arrest in 1971, caused principally by the government's actions, and in the face of the defendant's demand for trial in October of 1972, is in violation of

the right to a speedy trial as embodied in the spirit and the letter of this district's Plan to Implement Rule 50(b), Rule 48(b) of the Federal Rules of Criminal Procedure, and the Sixth Amendment. In support of his motion the defendant states as follows:

1. The defendant was arrested in November of 1971 in the company of three other persons. The indictment, which was not returned until three months later, alleges that the three persons were aliens who were being unlawfully transported by the defendant.

2. On or about February 28, 1972, Joseph Beeler was appointed to represent the defendant in this cause. As the undersigned attorney is informed and believes, shortly thereafter Mr. Beeler made a request of Mr. Stevenson, an Assistant United States Attorney, for information as to the whereabouts of the three alleged aliens or for permission to interview them. Mr. Stevenson declined this request.

3. On June 8, 1972, this Court granted the defendant's motion to suppress evidence. While the government filed its notice of appeal on June 23, 1972, its brief on appeal was not filed until October 20, 1972. Thereafter, on or about October 31, 1972, the defendant asserted his right to a speedy trial and objected to any further continuance in the case.

4. The case is now pending before the Supreme Court on the grant of the government's Petition for a Writ of Certiorari.

5. The undersigned attorney was assigned to the case on August 15, 1974, Mr. Beeler having left the office of the Federal Defender Program. On or about August 23, 1974, in the absence of this Court, the undersigned attorney appeared before the emergency judge, Judge

Marshall, and presented the motion 'to produce witnesses that is attached hereto as Exhibit A. Expressing the view that the matter was not of an emergency nature, Judge Marshall continued the motion for hearing before this Court on September 12, 1974.

6. The court appearance on August 23rd was the seventh time, according to the docket sheet, that the parties had appeared after the court's ruling suppressing the evidence, the other occasions having been on October 17, 1973, October 31, 1973, December 21, 1973, March 20, 1974, May 20, 1974, and June 28, 1974. On none of these occasions was objection made to the power of this Court over the cause, as the undersigned attorney had been informed and believes.

7. The day following the appearance of the undersigned attorney before Judge Marshall, the government filed in the Court of Appeals a motion to recall the mandate, stating a single ground for the motion, which was "to preclude further proceedings in the district court."

8. On August 30, 1974, the Court of Appeals granted the government's motion and recalled the mandate. A copy of said Order is attached hereto as Exhibit B.

9. On September 12, 1974, when the defendant's motion to produce witnesses was presented to this Court, the action of the Court of Appeals was argued by the prosecutor to have deprived the Court of jurisdiction to entertain the motion. This Court did not reach that issue, but nonetheless denied the defendant's motion.

10. To the contrary, this Court retains jurisdiction to enter such orders as justice may require despite the pendency of the government's appeal.

11. At the appearance on September 12, 1974, the prosecutor declined to state whether or not the three alleged aliens in this cause were presently within the continental limits of the United States, or were without the reach of the subpoena power of the Court and the parties.

12. Mr. Justice Rehnquist has recently reminded us that "we may not as judges [or lawyers] ignore what we know as men, . . ." *United States v. Maze*, 94 S. Ct. 645, 650 n.7 (1974). We regard it as too plain for further comment that the three aliens are no longer subject to the court's jurisdiction and/or subpoena power; that the government's recent action in the Court of Appeals was designed to render more difficult the presentation to this Court of the question of whether the case has become moot; and that the same is true of the prosecutor's refusal to address the issue in this Court on September 12th.

13. It is the duty of attorneys for parties in litigation to advise the court if and when a case becomes moot. It is respectfully suggested that it is likewise the duty of the Court to take action when, as here, a case or controversy is no longer presented because of mootness.

14. The only forum in which action presently may be taken to develop the facts in regard to mootness is this Court. Absent on affirmative response by an government to this motion, moreover, it is respectfully suggested that the defendant's contentions must be accepted as accurate.

15. The foregoing circumstances, it is submitted, bear directly on the Court's exercise of discretion in ruling on the additional motion of the defendant, which

is to dismiss the indictment because of the delay herein. While it is recognized that not all the delay has occurred herein is the responsibility of the prosecutor–the government's Petition for a Writ of Certiorari, for example, remained pending for a number of months–the defendant is responsible for none of the delay and asserted his right to a speedy trial nearly two years ago. Should the opinions of this Court and the Seventh Circuit not be upheld by the Supreme Court, a period of more than three years is likely to have elapsed between the time of the defendant's arrest and his trial.

16. It is our position that a dismissal order should now be entered, first, under the Plan of this district in Implementation of Rule 50(b) of the Federal Rules of Criminal Procedure attached hereto as Exhibit C. The Plan provides generally that trials of defendants not in custody shall commence within 180 days after a plea of not guilty. Par. 2(b). Discretion is vested in the Court, however, to permit extensions of this time limit, but "only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges and the interest of the defendant in a speedy trial." *Id.*, par. 4. The same paragraph specifically mentions that the court may take into consideration a reasonable period of delay for interlocutory appeals.

17. The reasons that overlooking the time limits under the Plan would not serve "the interest of justice" are those which also establish congnizable injury to the defendant as the result of the delay herein, and are set forth in the affidavits of the defendant and his wife, attached hereto as Exhibits D and E. In brief, they show:

a. The anxiety attendant to the pendency of these felony charges is not confined to the defendant alone; his wife and nine children are also aware of the charges. This knowledge, and their loyalty to and affection for the defendant, have produced illness, basic negative changes in career plans, and negative attitudes toward the criminal justice system.

b. In the opinion of the undersigned attorney, who was assigned last month to the case for the first time, the defendant's memory of the events of November, 1971, is no longer adequate to allow adequate preparation for trial or an effective trial presentation of a defense;

c. The defendant's immediate supervisor at the company for which he has worked at all pertinent times is aware of the pendendy of these felony charges, thus affecting to an unascertainable degree the defendant's opportunities for continued employment and advancement.

18. Considering all the circumstances, the delay herein cannot be regarded as reasonable.

19. Rule 48(b) of the Federal Rules of Criminal Procedure provides an independent ground for dismissal for violation of the defendant's speedy trial rights. As in the case of the district Plan, a decision under Rule 48(b) may take into account factors that are not necessarily germane to a decision whether the Sixth Amendment right to a speedy trial has also been violated.

20. The passage of time here, we submit, also establishes a violation of the constitutional right to a speedy trial.

Respectfully submitted,

PASCUAL GUANA-SANCHEZ, Defendant

By:
His Attorney

THOMAS D. DECKER
Federal Defender Program
219 South Dearborn Street
Chicago, Illinois 60604
435-5580

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS EASTERN DIVISION**

UNITED STATES OF AMERICA	)	
	)	
vs.	)	NO. 72 CR 50
	)	
PASCUAL GUANA-SANCHEZ	)	

MOTION TO PRODUCE WITNESSES

The defendant, PASCUAL GUANA-SANCHEZ, by his attorneys Thomas D. Decker and Federal Defender Program, moves the Court to order the production for purposes of interview of the following persons: Juan Mata-Zapata, Agustin Olivares-Hernandez, and David Perez-Gutierrez. In support of his motion the defendant states as follows:

1. The defendant is charged with the unlawful transportation of aliens.

2. The defendant made a formal demand for a speedy trial nearly two years ago.

3. The indictment herein identifies the above-named persons as aliens who were unlawfully transported by the defendant in 1971. They are thus uniquely within the control of the United States.

4. Following the affirmance by the Court of

Appeals, 484 F.2d 590 (7th Cir. 1973), of Judge Parson's ruling (granting the defendant's motion to suppress witness testimony), no stay of mandate was sought by the government, and the mandate issued. While certiorari was granted, it is therefore likely that a trial may be scheduled in the near future.

5. The undersigned attorney was assigned to this cause on August 15, 1974, the former attorney for the defendant having left the office of the Federal Defender Program, and is ignorant of the circumstances underlying the charges.

6. It is essential to proper pretrial preparation that access be had to the above-named persons for the purpose of interviewing, but the defendant has no information as to their whereabouts.

Respectfully submitted,

PASCUAL GUANA-SANCHEZ, Defendant

By:
His Attorney

THOMAS D. DECKER
Federal Defender Program
219 South Dearborn Street
Chicago, Illinois 60604
435-5580

EXHIBIT B
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 30, 1974

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*	)	
	)	Appeal from the
	)	United States Dis-
No. 72-1784 vs.	)	trict Court for the
	)	Northern District
PASCUAL GUANA-SANCHEZ, *Defendant-Appellee.*	)	of Illinois, Eastern
	)	Divsn.
		No. 72 CR 50

This matter comes before the Court on the Government's motion to recall mandate pending disposition by Supreme Court and defendant-appellee's answer to government's motion to recall mandate. On consideration whereof,

IT IS ORDERED that in light of the United States Supreme Court's granting of certiorari on June 19, 1974, that the government's said motion be, and the same is hereby, GRANTED.

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

PLAN TO IMPLEMENT RULE 50(b)

Pursuant to the requirement of Rule 50(b) of the Federal Rules of Criminal Procedure effective October 1, 1972, the judges of the United States District Court for the Northern District of Illinois have adopted the following Plan to minimize undue delay and to further the prompt disposition of criminal cases:

1. Priorities in Scheduling Criminal Cases.

(a) Preference shall be given to criminal proceedings as far as practicable as required by Rule 50(a) of the Federal Rules of Criminal Procedure.

(b) The trial of defendants in custody and defendants whose pretrial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.

(c) Individual calendars shall be managed so that it will be reasonably anticipated that every criminal case set for trial will be reached during the week of original setting.

2. Time Requirements.

Subject to the provisions of section 4 hereof, the judges of this Court will observe the following time limits, which are deemed to be maximum time limits:

(a) Arraignments. If a defendant is prosecuted on an information or an indictment, he shall be arraigned

and enter a plea within 20 days if in custody, or within 30 days if not in custody, calculated from the date of the filing of the information or the return of the indictment or from the date of arrest, whichever is the later. The provisions of section 3 pertaining to pretrial discovery and inspection shall be considered in connection with the implementation of this section.

(b) Trial. The trial shall commence within 90 days after a plea of not guilty, if the defendant is held in custody, or within 180 days if he is not in custody.

(c) Sentencing. A defendant shall ordinarily be sentenced within 45 days of the date of his conviction or plea of guilty or nolo contendere.

(d) Where a defendant is apprehended outside of this district, the time set out above shall begin to run when the defendant is returned to this district.

(e) The implementation of other sections of this Plan will in most cases dispose of a criminal case in substantially less time than the maximums herein set forth.

3. Pretrial Discovery and Inspection.

(a) Within five (5) days after the arraignment the United States Attorney and the defendant's attorney shall confer and, upon request, the government shall:

(1) Permit defendant's attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(2) Permit defendant's attorney to inspect and copy or photograph any relevant results or reports

of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(3) Permit defendant's attorney to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(4) Permit defendant's attorney to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which are the property of the defendant and which are within the possession, custody or control of the government;

(5) Permit defendant's attorney to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record;

(6) Permit defendant's attorney to inspect, copy or photograph any evidence favorable to the defendant.

(b) If, in the judgment of the United States Attorney, it would not be in the interest of justice to make any one or more disclosures set forth in paragraph (a) and requested by defendant's counsel, disclosure may be declined. A declination of any request disclosure shall be in writing, directed to defendant's counsel, and signed personally by the United States Attorney or the First Assistant United States Attorney, and shall specify the types of disclosures that are declined. If the defendant seeks to challenge the declination he shall proceed pursuant to subsection (c) below.

(c) Additional discovery or inspection. If additional discovery or inspection is sought, defendant's attorney shall confer with the appropriate Assistant United States Attorney within ten (10) days of the arraignment (or such later time as may be set by the Court for the filing of pretrial motions) with a view to satisfying these requests in a cooperative atmosphere without recourse to the Court. The request may be oral or written and the United States Attorney shall respond in like manner.

(d) In the event defendant thereafter moves for additional discovery or inspection, his motion shall be filed within the time set by the Court for the filing of pretrial motions. It shall contain:

(1) The statement that the prescribed conference was held;

(2) the date of said conference;

(3) the name of the Assistant United States Attorney with whom conference was held; and

(4) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of defendant's motion.

(e) Any duty of disclosure and discovery set forth in this Plan is a continuing one and the United States Attorney shall produce any additional information gained by the government.

(f) Any disclosure granted by the government pursuant to this Plan of material within the purview of Rules 16(a)(2) and 16(b), Federal Rules of Criminal Procedure, shall be considered as relief sought by the defendant and granted by the Court.

4. Extension of Time Limits.

Any period of time prescribed by this Plan may be extended by the Court. The Court shall grant such

extensions only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges and the interest of the defendant in a speedy trial. Among other reasons, the Court may take into consideration: a reasonable period of delay resulting from other proceedings concerning the defendant, including, but not limited to, proceedings for the determination of competency and the period during which he is incompetent to stand trial, extraordinary pretrial motions, stays, interlocutory appeals, trial of other charges, the period of delay resulting from continuances granted by the Court for persuasive reasons, and the period during which such matters are under consideration.

5. Effect of Noncompliance with Time Limits.

Upon the expiration of a time limit, as prescribed by or extended under this Plan, a defendant who is in custody shall be released from custody upon such bail or conditions of release as he can meet unless the Court finds that the defendant is responsible for the failure to comply with the time limits. Subject to the provisions of 18 U.S.C. §3146, if the Court finds that a defendant who is not in custody is responsible for failure to comply with the time limits, such defendant may have his release revoked unless there is good cause shown for the failure to comply. Subject to the power of the Court to dismiss a case for unnecessary delay, the failure to conform with the time limits herein prescribed shall not require the dismissal of the prosecution.

6. Definition of "Custody".

As used in this Plan, "custody" means physical detention on the federal charge contained in the pertinent complaint, information, or indictment.

7. Procedures Intended to Facilitate Prompt Disposition of Cases.

(a) All pretrial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the Court's criminal docket.

(b) The Court or the Magistrate at the time of arraignment or at the time of any proceeding preliminary to arraignment shall promptly appoint counsel where appropriate under the Criminal Justice Act and Rule 44 of the Federal Rules of Criminal Procedure. If a defendant appears for arraignment without counsel, his arraignment may be postponed not more than one week to permit him to obtain or to consult with counsel. When appropriate, the Court may cause a plea of not guilty to be entered for the defendant. The Court shall take adequate steps to ensure that defendants are represented by counsel.

(c) A trial date shall be set at the time of arraignment or at the earliest practicable time thereafter.

(d) Except for good cause shown, the Court may not extend the time for motions under F.R.Crim.P. 12(b)(3) beyond 10 days after plea. Such motions will be ruled upon promptly, so that the trial need not be delayed.

(e) If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.

8. Retrials.

If the defendant is to be tried or retried following a mistrial, an order for a new trial, or an appeal or collateral attack, the time shall run from the date when

the order occasioning the trial or retrial becomes final and the case has been reassigned pursuant to the provisions of Circuit Rule 23.

9. Review of Defendants in Custody and Delinquent Cases.

The United States Attorney shall within 5 days after the close of the reporting period furnish the Court with a copy of a biweekly report of persons in custody, on which shall be indicated by court number the judge to whose court such person has been assigned. A copy of such report shall be furnished each judge of the Court.

10. Responsibility of United States Attorney.

(a) The Court has primary responsibility for setting and calling cases for trial. A conflict in schedules of Assistant United States Attorneys will not be ground for a continuance or delayed setting except under unusual circumstances approved by the Court and called to the Court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases.

(b) If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state, or other institution or that of another jurisdiction, it is his duty promptly:

(1) to undertake to obtain the presence of the prisoner for plea and trial; or

(2) when the government is unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under the Federal Rules of Criminal Procedure and this Plan.

11. Effective Date of Plan.

This Plan shall become effective upon approval of the reviewing panel designated in accordance with Federal Rule of Criminal Procedure 50(b) and shall apply to all criminal proceedings begun after this Plan shall have become effective.

"Criminal proceedings begun" means by arrest, return of indictment, or filing of information, whichever occurs first.

Approved January 30, 1973.

EXHIBIT D

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT

PASCUAL GUANA-SANCHEZ, being first duly sworn, on oath deposes and states as follows:

1. I am the defendant in Case No. 72 CR 50, United States District Court, Northern District of Illinois.

2. I was arrested in 1971 in this case, at which time I was working at the job I still hold. I told the plant superintendent that I had been arrested and charged with a federal crime.

3. My memory of the events surrounding my arrest is presently not good. I believe the arrest occurred in Villa Park, though I am not sure. I do not recall the

names of the officers who arrested me, the names of the persons who were with me at the time, or other events in that period of time.

/s/ Pascual Sanchez
Pascual Sanchez

SUBSCRIBED AND SWORN TO BEFORE ME
this seventeenth day of September, 1974.

/s/ (illegible)
(illegible)
Notary Public

EXHIBIT E

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT

JULIA GUANA-SANCHEZ, being first duly sworn, on oath deposes and states as follows:

1. I am the wife of Pascual Guana-Sanchez. We have been married 22 years and have nine children.

2. During the period of our marriage I have never known my husband to have been in trouble with the authorities other than the case brought in the federal court in Chicago. He has always worked regularly, does

not use liquor, and has the respect and love of his family. He spends almost all his free time with the children.

3. After his arrest in November of 1971, I became nervous and anxious to the point that my doctor prescribed tranquillizers which I am still taking every day.

4. Each of our children is aware of the fact that his father was arrested. Each holds him in high regard and is afraid of what may happen. The children speak to me about the case often and have said they would like to go to jail with him if he is sent.

5. Since 1971 I have observed the following about my children that I think are the result of knowledge of their father's arrest and the possibility that he will be jailed:

a. My 21-year-old son has abandoned his plans to become a police officer. He has become cynical about the police system and the damage he has seen to family members as the result of the delay in finishing the case.

b. My 18-year-old son has long planned to go to college and then become a doctor. He has said, however, that he fears something may happen to his father in this case and that he would instead work to help the family if necessary.

c. My 15-year-old daughter was not a nervous child. Beginning about a year ago, however, she began having stomach pains and fainting spells. She has been examined by four doctors since then and they have told me they can find nothing wrong with her physically. In particular, she has become visibly ill when she has heard that her father is to go to court.

d. After my 12-year-old son heard of his father's arrest, he became hysterical or visibly shaken on a number of occasions, and began biting his fingernails. fingernails.

e. My 19-year-old daughter, who is now married, planned to go to college to study art. After her father's arrest, she quit high school.

f. Since my husband's arrest, none of our children's grades in school have gone up. Their grades have generally suffered.

/s/ Mrs. Julia Sanchez
Mrs. Julia Sanchez

SUBSCRIBED AND SWORN TO BEFORE ME
this seventeenth day of September, 1974.

/s/ (illegible)
(illegible)
Notary Public

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION**

UNITED STATES OF AMERICA	)	
	)	
vs.	)	No. 72 CR 50
	)	
PASCUAL GUANA-SANCHEZ	)	

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS INDICTMENT.**

Jurisdiction; Speedy Trial

The defendant's motion detials the unusual and prejudicial delay in this cause. The single most striking elements of this delay are the four-month period it took the government to file its Brief in the Court of Appeals after this Court's opinion suppressing evidence, the fact, of which this Court may take notice, that the government's Brief was only filed in the Supreme Court a matter of weeks ago, and the familial damage (detailed in the affidavits of Mr. and Mrs. Guana-Sanchez) wrought by the protracted proceedings herein. In brief, as to the latter, what may appear to the government to be a routine alien case has caused incalculable injury already.

Recently, under facts less impressive than those here, the Ninth Circuit approved a trial court's dismissal of

an indictment during the pendency of the government's appeal from an order suppressing evidence. *United States v. Cox*, 475 F.2d 837 (1973). The basis for the dismissal was the trial court's view that the defendant's speedy trial rights under the Sixth Amendment had been jeopardized. *Id.* at 841. While the exact chronology of events is not detailed in the appellate opinion, it is clear that the delay that prompted the dismissal was that on appeal; there was no suggestion that the suppression hearing was not conducted promptly, and there was no pre-arrest delay. (The defendant was arrested on February 7, 1972, and indicted nine days later; the opinion of the Court of Appeals issued on March 12, 1973.)

The *Cox* opinion, of course, also answers the government's claim, advanced at the hearing last week, that this Court lacks jurisdiction by reason of appellate activity in the case.

Compared with *Cox*, in which the appellate decision issued a year after the defendant's arrest, the delay herein—now approaching three years—is excessive. We believe a constitutional violation is made out. If not, the case fits within the Seventh Circuit's statement of the reach of Rule 48(b), Fed. R. Crim. P., in *United States v. Clay*, 481 F.2d 133, 137 (7th Cir. 1973):

> "If cases are completely inactive for prolonged periods, or perhaps simply too old to be kept on an active calendar, a court surely has power to enter an order of dismissal for want of prosecution even though neither litigant has been prejudiced by the delay. Moreover, the court may properly threaten to enter such an order as a means of requiring litigants to pursue their matters to an expeditious conclusion. . . ."

Or the Court properly may enforce the judgment of the Plan to Implement Rule 50(b) (Exhibit C to defendant's Motion to Dismiss). The Plan requires a finding, impossible here we submit, that "the interest of justice" would be served if delays of more than six months are to be countenanced.

Were there a question about the view that should be taken of the three-year passage of time herein, we submit it is dispelled by the additional circumstances shown in the affidavits of the defendant and his wife that accompany his motion. A family man, the defendant must contend daily with the knowledge that his wife and nine children are aware that he is an accused felon and have been affected. Having worked at the same job for some time, the defendant is also subject to the effect on his employment prospects, as well as advancements, that his employer's knowledge of the charges will have. He has sworn also to a flagging memory about the event of November, 1971, a hardly unusual turn of events.

The Court should also consider what the passage of time means in terms of the credibility of the government's witnesses. It is alleged in the indictment that they are aliens, from Spanish-speaking countries most likely. If they have returned to their cultures, what effect has the delay had on their recollections? And what is likely to be the effect on their testimony if, as seems to be the case, their voluntary return can be obtained only by inducements of one sort or another?

Weighed against these considerations, it is submitted, the government's lackadaisical appreciation of the defendant's rights warrants this Court's response.

Rights to Due Process, to Compulsory Process, and to Confrontation of Witnesses

We have detailed in our motion that the sole witnesses against the defendants, the very aliens he is alleged to have transported, were made unavilable to the defense and are now presumably out of the country. We contend, taking into account also the practical ineffectiveness of any future effort to evaluate before or at trial the worth of what the alien-witnesses might say, that the indictment must be dismissed.

The proposition is well established that a defendant has a right to unimpeded access to witnesses before and at trial. *See, e.g., Webb v. Texas*, 409 U.S. 95 (1972) (per curiam); *Washington v. Texas*, 388 U.S. 14 (1967); *United States v. White*, 454 F.2d 435, 438 (7th Cir. 1971), *cert. denied*, 406 U.S. 962, (1972), and authorities cited therein. Thus, when, as here, the claim was made that the government had control of witnesses and obstructed defense access to them, the Seventh Circuit cited *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966), in stating: "We wish to make it clear that witnesses are the special property of neither party and in the absence of compelling reasons, *the district court should facilitate access to them before trial whenever it is requested. . . .*" *United States v. Vole*, 435 F.2d 774, 778 (1970) (dictum; emphasis added).

The rule has particular force in cases alleging dealings with illegal aliens, as the latter are typically incarcerated and unavailable to the defense. Having sought and been denied information about the witnesses against Guana-

Sanchez, the defense was further thwarted by the apparent removal of the witnesses from the country. Directly on point is *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971). There the defendant had also been charged with illegal transporation (sic) of aliens. The government returned to Mexico three of the six aliens involved before defense counsel had the opportunity to interview them. The defendant moved for dismissal of the indictment on the grounds that the government had, by the return of the aliens, violated his fifth and sixth amendment rights to due process of law and access to witnesses. Defendant's motion was denied, and he was later convicted at trial. Defendant appealed only the denial of his dismissal motion. The Ninth Circuit reversed the conviction because the government had, by its acts, deprived the accused of basic constitutional rights, saying:

> "We decline to indulge in any speculation that the interviews [of the deported witnesses] would, or would not, have been fruitful to the defense." *Id.* at 5.

We consider that the interests to which the prosecutor alluded at the hearing last week–the mandate hastily was recalled to the Court of Appeals; the Supreme Court has accepted certiorari so that an academic issue may be resolved–are trifling in comparison with the wrongs already inflicted on the defendant and his family, to say nothing of the concept

of speedy and equal justice. We ask the Court to rectify these wrongs in the only way possible, by dismissing the indictment.

Respectfully submitted,

PASCUAL GUANA-SANCHEZ, Defendant

By:
His Attorney

THOMAS D. DECKER
Federal Defender Program
219 South Dearborn Street
Chicago, Illinois 60604
435-5580

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	No. 72 Cr 50
	)	
	)	
PASCUAL GUANA-SANCHEZ	)	

MOTION OF DEFENDANT FOR DISCOVERY OR, ALTERNATIVELY, FOR IMMEDIATE TRIAL

The defendant, PASCUAL GUANA-SANCHEZ, by his attorneys Thomas D. Decker, and Federal Defender Program, pursuant to Rules 7(f) and 16(b), moves the Court to order forthwith production by the plaintiff of the following information.

1. When was the last contact had by the government and its agents with each of the three alleged aliens named in the indictment;

2. When, if at any time, and where were said aliens in the custody of the United States during and after November of 1971;

3. Were said aliens charged with the commission of any federal crimes, or violations of any other statutes or regulations? If so, describe;

4. What information is available concerning the present whereabouts of said aliens;

5. What assistance, remuneration or other consideration was given said aliens, particularly in regard to their travel from the Northern District of Illinois if they are not now in custody;

6. What agreements, promises or understandings were made or given by said aliens or agents of the United States in regard to testimony that might be given by the former at the trial of this cause;

7. What information exists to support the belief that said aliens are now subject to the process of this Court, to extradition for purposes of testimony at the trial of this cause, or that their presence at trial otherwise can be assured.

The defendant further moves that copies of all documents pertinent to the above be produced with the government's answers.

The foregoing motion should be granted because of its bearing on the issues raised by the defendant's Motion to Dismiss the Indictment, and also because of the information that might be disclosed thereby as to the mootness of this cause. Should the essential government witnesses be unavailable, as seems likely, this information should be disclosed to the Supreme Court under its rule that the merits of a controversy may not be considered if the dispute has become moot. *See, e.g., Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944); *Mills v. Green*, 159 U.S. 651 (1895).

In the alternative, should the Court deny the foregoing motion, as well as the defendant's Motion to

Dismiss the Indictment, the defendant moves for an immediate trial for the reasons ~~set forth~~ in his Motion to Dismiss.

Respectfully submitted,

PASCUAL GUANA-SANCHEZ, Defendant

By:
His Attorney

THOMAS D. DECKER
Federal Defender Program
219 South Dearborn Street
Chicago, Illinois 60604
435-5580

APPENDIX D

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable James B. Parsons

Cause No. 72 CR 50 Date September 18, 1974

Title of Cause United States of America v. Pascual Guena-Sanchez

Brief Statement of Motion: Motion to Dismiss Indictment and Defendant's Motion for Discovery or, Alternatively, for Immediate Trial.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: Thomas D. Decker, Federal Defender Program

Representing: Pascual Guena-Sanchez

Names and Addresses of other counsel entitled to notice and names of parties they represent: James R. Thompson, USA

JBP

For reasons stated of record, it is ordered that the motion of the defendant to dismiss the indictment and defendants Motion for discovery or alternatively, for immediate trial be and the same hereby are denied.

Reserve space below for notations by minute clerk

A TRUE COPY ATTEST
H. STUART CUNNINGHAM, CLERK
BY
U.S. DISTRICT
NORTHERN DISTRICT OF ILLINOIS
DATED SEP 11 1974

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

Supreme Court, U. S.
FILED
OCT 29 1974
MICHAEL RODAK, JR., CLERK

No. 73-820

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE WRIT ON ACCOUNT OF MOOTNESS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-820

UNITED STATES OF AMERICA, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE WRIT ON ACCOUNT OF MOOTNESS

The United States submits this memorandum in response to respondent's motion to dismiss the writ on account of mootness.

The question presented in this case is whether respondent has standing to suppress statements and future testimony of three witnesses on the ground that the witnesses were unlawfully arrested while passengers in his automobile.

Respondent's claim of mootness is based upon the suppositions that all three witnesses "have been allowed by the government to melt back into the populace of Mexico," and that their present whereabouts are unknown to the government (Motion p. 6), from which suppositions respondent concludes that the question presented

is merely hypothetical and moot because the government will not be using the statements or testimony of any of the witnesses at respondent's trial.[1]

We have recently been informed by the Immigration and Naturalization Service, however, that one of the witnesses is presently living and working in this country at a location known to the Service. The validity of the suppression of his testimony is unquestionably a live issue. The other two witnesses have returned to Mexico but their locations too are known to the Service. There is no reason to believe that these witnesses will refuse to return to the United States for the purpose of testifying at respondent's trial, if such testimony is required.[2] Accordingly, this case is clearly not moot.

For these reasons petitioner submits that respondent's motion to dismiss or remand should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

---

[1]Respondent's assertions concerning the district court's denials of his motion to dismiss on speedy trial grounds and of his other motions have no bearing on the question of mootness. The government still intends to prosecute respondent if the judgment of the court of appeals is reversed, and we would oppose his speedy trial motion. The question whether the indictment should be dismissed on speedy trial grounds is, of course, not before the Court, and can be decided after this Court's disposition of the case, in light of such facts as may be shown concerning the relevant criteria.

[2]If it should develop that those witnesses are unavailable at trial, there may then be an issue regarding the propriety of proceeding with the trial. The record presently does not permit a determination of the facts that may be relevant to the disposition of this issue, if it arises, nor is it clear that the Seventh Circuit would follow the decision of the Ninth Circuit in *United States v. Mendez-Rodriguez*, 450 F. 2d 1, should that decision be applicable to the facts of this case. All of this, of course, is entirely speculative; it provides no basis for concluding that the case now before this Court is moot.

Supreme Court, U. S.
FILED
AUG 13 1974
MICHAEL RODAK, JR., CLERK

No. 73-820

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
GERALD P. NORTON,
Assistant to the Solicitor General,
PETER M. SHANNON, JR.,
ANN WALLACE HOLT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 484 F. 2d 590. The oral opinion and the order of the district court (Pet. App. 16a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on July 18, 1973. A timely petition for rehearing was denied on September 25, 1974 (Pet. App. 15a). On October 17, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to November 23, 1973. The petition was filed

on that date and granted on June 17, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant has standing to suppress statements and future testimony of witnesses on the ground that they were unlawfully arrested while passengers in his automobile.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 274 of the Immigration and Nationality Act of 1952, 66 Stat. 228, 8 U.S.C. 1324(a) provides in pertinent part:

> Any person, including the owner, operator, pilot, master, commanding officer, agent or consignee of any means of transportation who—
>
> * * * * *
>
> (2) Knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> * * * * *
>
> any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States * * * shall be guilty of a felony * * *.

STATEMENT

A one-count indictment returned in the United States District Court for the Northern District of Illinois charged respondent Pascual Guana-Sanchez with having knowingly and unlawfully transported three aliens within the United States, in violation of 8 U.S.C. 1324(a)(2). Respondent filed a pretrial motion to suppress evidence and to dismiss the indictment, alleging that he and the passengers in his car had been illegally arrested and that the government's evidence depended upon the testimony of the passengers, said to be the "fruit" of the illegal arrests. The district court denied the motion to dismiss, but, after an evidentiary hearing, granted the motion to suppress statements made by the three passengers and their future testimony at his trial (Pet. App. 16a–26a). The court of appeals affirmed, one judge dissenting (Pet. App. 1a–13a).

1. The relevant facts, as developed at the hearing on the motion to suppress, are as follows:

On Wednesday, November 17, 1971, at approximately 2:30 a.m., in the Chicago suburb of Villa Park,

Illinois, officer Pat Tenuto of the Villa Park police saw a station wagon that had been driven off the road, over the curb and onto a vacant lot in a wooded, exclusively industrial section of Villa Park (A. 6, 8–9, 11, 28). The headlights and interior light were shining, and one of the occupants was reading what appeared to be a map (A. 9). Officer Tenuto said to his partner, officer Hall, " 'Let's go over and see if they are lost or anything is wrong.' " (A. 10).[1] At 2:33 a.m., the officers radioed in to the station house dispatcher the license number of the car (A. 76, line 3), as they are required to do before investigating any vehicle. They then approached the car and saw that respondent, the driver, was reading an Illinois road map. They also noticed that the car contained three passengers, one of them apparently asleep, and three shopping bags filled with "clothing or material" (A. 17). Officer Hall asked respondent if he and his partner could be of assistance (A. 16). Respondent answered that he was looking for a restaurant on North Avenue owned by a friend, the name of which he had forgotten; if unable to find that restaurant, he wanted to find another establishment called the "Beef & Barrel" (A. 16–19). Upon radio inquiry of police departments in nearby towns, officer Tenuto established that no restaurants in the vicinity were open beyond 1:00 a.m. (A. 20).

[1] Officer Tenuto was the only witness at the suppression hearing. The government and defense counsel agreed that officer Hall's testimony would have been "similar" to Tenuto's testimony (A. 68).

Officer Hall asked respondent for some identification (A. 20). Respondent produced an Illinois driver's license issued to Pascual Guana-Sanchez, 9727 South Avenue L., Chicago. Officer Tenuto noted that the date on the license was unexpired and that the license appeared to be valid (A. 21, 58). Officer Hall then asked the three passengers for identification (A. 23). This was in accordance with a standard operating procedure, applicable only to nighttime investigations of automobiles and their occupants, which had been prescribed because many burglaries had occurred in the industrial area of Villa Park (A. 26–27).

The three passengers' only response was to shrug their shoulders and gesture with their hands, indicating that they did not comprehend Hall's question. Hall repeated his question and received the same reaction Hall then asked respondent if he spoke Spanish and requested him to ask his passengers for identification (A. 23). Respondent addressed his passengers in a foreign language and asked, so the officers assumed, whether they had identification. The two passengers in the rear seat shook their heads indicating "no." The passenger in the front seat took out a card and gave it to the officers (A. 24). The writing on the card was Spanish, but officer Tenuto recognized the words "Army," "military" and "Mexico," from which he surmised it was a Mexican Army identification card. At officer Hall's request, respondent again spoke with the passengers in the back seat to make sure that they had understood the request for identification (A. 25).

Officer Tenuto had had several experiences—the most recent only a week earlier—in which groups of people had been discovered in the Villa Park area who spoke Spanish but not English, had no identification, were Mexican citizens and had illegally entered the United States and come by car to the area because there were factories there looking for cheap labor (A. 39–40, 44, 46). With this knowledge officer Tenuto radioed his supervisor, sergeant Weiser, and reported that the two passengers had no identification (A. 25). Weiser arrived on the scene at 2:37 a.m. (A. 76, line 4), a minute or two after Tenuto had radioed him (A. 25). The officers asked respondent to ask the passengers in the back seat to get out of the car, which they did. Then, following standard procedures applicable when unidentified persons are discovered at night sitting in a car parked off the road or near a factory, Sergeant Weiser asked the two passengers, through respondent as interpreter, if they would come to the police station for a security check (A. 25–27). The two passengers entered one of the police cars and were driven to the police station, a three or four minute trip (A. 28).

Meanwhile, officer Hall had asked respondent if he "wouldn't mind coming to the station" while the officers attempted to check out the two passengers who had no identification. Respondent replied, "Fine, I will come with you," and he, along with the passenger who had produced identification, followed the squad cars to the station (A. 28). Tenuto testified that had respondent not gone to the station, the police

would not have brought him there because he had produced identification and, so far as the police then knew, had broken no law (A. 53).[2] Once at the station, moreover, he was free to go at any time, until he was arrested on grounds unrelated to the charges in this case.[3] However, at no time after the police first approached his car did respondent ask or attempt to leave.

The radio dispatcher at the station established, after checking the license plate number that the officers had radioed in, that the car was registered to respondent, had not been stolen, and had not been reported in connection with any crime (A. 58). It is not entirely clear from the record when the officers received this information—but it was apparently either three to five minutes after they had radioed in the number, or a few minutes later when they arrived at the station house.[4]

---

[2] Had he attempted to drive away after the officers had returned his driver's license, *i.e.*, when the two unidentified passengers were still in the car, the officers would have pursued him (A. 64).

[3] While respondent was at the station, the police searched his car and found in the glove compartment a gun that was not registered. He was then placed in the detention cell and booked for unlawful possession of the gun (A. 52). No issue concerning this search and arrest is presented in this case.

[4] The dispatcher's radio log (A. 75–76) does not show any return call to Tenuto's patrol car (A. 76, No. 130) or to sergeant Weiser's car (A. 76, No. 132), although the dispatcher may have informed Weiser when he radioed the dispatcher at 2:37 a.m. that he had arrived on the scene (*id.* at line 4). By then the officers had established that the two passengers in the back seat had no identification. At the suppression hearing officer

Within a few minutes of their arrival at the station the supervisor had the three passengers write out their names, and he telephoned an immigration official in Chicago to conduct a name check (A. 30, 33). The immigration officer talked with the passengers, told the supervisor that the passengers had admitted illegal entry into the United States (A. 31–32), and asked the supervisor to hold respondent and the three passengers for the few hours remaining until morning (A. 32–33). When morning came, the passengers were turned over to immigration officers who had come out from Chicago (A. 61). On February 1, 1972, respondent was indicted for having transported the passengers illegally (A. 1–2).[5]

2. In June 1972, the district court granted respondent's pre-trial motion to suppress the statements and future testimony of the three aliens who had been present in respondent's automobile. The court found

Tenuto's initial recollection was that they had learned the results of the license check "[w]hen we got into the station * * *" (A. 57–80), but after reviewing the radio log he said they got an answer back "three to five minutes" after making the radio check (*ibid.*). The district court, apparently misreading the radio log, found that the officers requested the check at 2:33 a.m. and received the answer at 2:35 a.m. (Pet. App. 17a) the radio log reveals that the dispatcher received the answer at 2:35 a.m. (Gov. Ex. 1). The court of appeals did not specify when it believed the officers had received the answer to the license check (Pet. App. 2a), but apparently understood it to have occurred before respondent and the passengers went to the station (Pet. App. 4a, n.3), and perhaps even before the officers had returned respondent's license (Pet. App. 2a).

[5] The record does not clearly establish whether the passengers were given *Miranda* warnings, although officer Tenuto did not do so and knew of no one else having done so (A. 61–62). No issue is raised here in this regard.

that, while the police officers' initial interrogation may have been based on "proper investigative suspicions" (Pet. App. 19a), those suspicions were no longer justified after the officers ascertained that respondent had a valid driver's license and was the owner of the station wagon. Accordingly, the court concluded that the further interrogation of the passengers while they were in respondent's car constituted an unlawful "search" of the car even though they were in "plain view" (*id.* at 24a), and that the arrests of respondent and the passengers were unlawful (*id.* at 19a, 23a). It followed, in the court's opinion, that the discovery of the passengers' status as participants in and witnesses to respondent's offense was the "tainted fruit" of unlawful police conduct, and that their testimony would be "verbal evidence" subject to exclusion on the same basis as unlawfully obtained physical evidence and statements under the "fruit of the poisonous tree" doctrine (*id.* at 23a–24a). Believing that the government had not shown that the testimony of the witnesses could have been obtained independently of the illegal conduct, the court therefore unqualifiedly granted respondent's motion to suppress both the witnesses' statements obtained as a result of their interrogation and the witnesses' future testimony (*id.* at 24a, 26a).

3. On appeal, the government, conceding *arguendo* that the interrogation of the passengers while they were in respondent's car constituted a "search" of the car as to which he had standing to object, contended that the action was a reasonable investigatory stop

consistent with the Fourth Amendment under this Court's decisions in *Terry* v. *Ohio*, 392 U.S. 1, and *Adams* v. *Williams*, 407 U.S. 143. Similar arguments were advanced in support of the transportation of the passengers to the police station and the further questioning and detention of them there. Believing that the legality of respondent's trip to the station (whether regarded as an arrest or a detention) was immaterial to the question whether the statements and future testimony of the passengers were subject to suppression, the government did not address in the court of appeals the legality of respondent's detention.[6]

The majority of the court of appeals panel evidently agreed with the government that the initial questioning of the passengers while in respondent's car was not an unlawful search, for it treated the case as involving only an unconstitutional arrest, and explicitly stated that, "[w]hen the arrest was made," the interrogation of the passengers while inside the car had already occurred (Pet. App. 4a, n.3). With respect to whether respondent or the passengers had

[6] The petition's brief summary of the government's position in this regard may have been unclear, in stating that "[t]he government did not challenge in the court of appeals—and does not challenge here—the district court's conclusions that, when the police took respondent and his passengers to the police station, they made an unlawful arrest" (Pet. 5). While there was no challenge concerning the legality of the arrest of respondent, and we assume *arguendo* here that his arrest was unlawful, the government did defend on appeal the legality of the detention of the passengers, particularly the two who had no identification.

been unconstitutionally seized, the majority focussed only upon respondent and concluded that he had been unconstitutionally arrested when he had been invited to follow the officers to the station (Pet. App. 2a). Without explicitly discussing whether any of the passengers had also been unconstitutionally detained or arrested, the majority affirmed the district court's unqualified suppression of their statements and future testimony on the ground that it was evidence gained after "the arrest" and hence "was 'fruit of the poisonous tree' " (*id.* at 5a).

Judge Pell dissented, concluding, *inter alia*, that respondent had no standing to suppress the witnesses' statements or testimony (an issue which the majority had not discussed), because he was not aggrieved by their detention, "had no proprietary interest in their bodies—or minds," and hence had no legal basis for asserting their right to be free from illegal seizure (*id.* at 12a–13a). Judge Pell also discussed the question whether, assuming that the knowledge that respondent had committed an offense and that the passengers were witnesses to the offense was the product of unlawful police action, the future testimony of the witnesses about events occurring before the encounter with the police should therefore be suppressed (*id.* at 6a-11a). He concluded that the proffer of living witnesses was materially different from the use of inanimate objects as evidence, and that the majority's decision constituted a departure from the general rule that the testimony of a witness should not automatically be suppressed.

SUMMARY OF ARGUMENT

In affirming the district court's order granting respondent's motion to suppress statements made by passengers in his car and their future testimony at his trial, the court of appeals has necessarily held that respondent has standing to challenge the legality of the detention or arrest of the passengers. That ruling contravenes the established principle that only the victim of a Fourth Amendment violation may obtain suppression of the tainted fruit of such official misconduct. For this reason alone, the decision below should be reversed.

ARGUMENT

RESPONDENT LACKS STANDING TO CHALLENGE THE LEGALITY OF THE ARREST OF PASSENGERS IN HIS CAR AND TO SECURE THE SUPPRESSION EITHER OF STATEMENTS THEY MADE IMMEDIATELY AFTER THEIR ALLEGEDLY UNLAWFUL ARREST OR OF THEIR FUTURE TESTIMONY AT HIS TRIAL

1. This case presents questions concerning the availability of one particular remedy—the exclusionary rule—to a person other than the victim of alleged police misconduct violating Fourth Amendment standards.[7] Respondent's disclaimers notwithstanding,[8] the

[7] Since the challenged action here was taken by local police officers, it is subject to the Fourth Amendment principles incorporated in the Fourteenth Amendment. *Elkins* v. *United States*, 364 U.S. 206.

[8] Respondent contended in his opposition that he had "[a]t no point * * * attempted to assert the right of the [persons] * * * discovered in his automobile * * *" (Mem. Opp. 9), that he "could not be less concerned with any violation of the rights of the passengers * * *" (*id.* at 10), that he "has not challenged the arrest of the passengers" (*id.* at 11), and that he "asserts the rights of no one but himself" (*ibid.*).

judgment of the court of appeals in this case necessarily determined that respondent was entitled to suppression of evidentiary fruits of the allegedly unconstitutional arrest of his passengers, not of himself.

It is difficult to appreciate what led the majority of the court of appeals to its apparently novel result. Perhaps the government itself misled the court by debating the propriety of questioning the passengers while they were still in the car, on the premise that this amounted to a "search" of an area under the respondent's control. We were then challenging the district court finding that this "search" was unlawful. Cf. *Cardwell* v. *Lewis*, No. 72–1603, decided June 17, 1974, slip op., pp. 5–8 (plurality opinion). See, also, *United States* v. *Dionisio*, 410 U.S. 1, 13–15; *Abbott* v. *Beto*, 469 F. 2d 1324, 1325 (C.A. 5).[9] But, correctly we think, the court of appeals did not endorse that ruling. On the contrary, it focused entirely on what it characterized as the subsequent "arrest" of respondent and his passengers when they were "ordered" to the police station. See Pet. App. 3a–5a and nn. 3, 4. Moreover, as the court below itself stressed (Pet. App. 4a, n. 3), no incriminating information can be traced to the few questions asked while the passengers were inside the vehicle. The alleged "search" of the car is no part of the case as it reaches this Court.

Nor is respondent's own "arrest" relevant. Respondent himself made no incriminating statements, and

[9] There was, in fact, no "search" of the car in the constitutional sense: the passengers were in plain view and the officers never entered the vehicle.

his arrest yielded no information pointing to the commission of an offense or his passengers' status as witnesses thereto. Had respondent alone been arrested, there would plainly have been no "tainted fruit." Conversely, if only the two passengers, but not respondent, had been arrested, the same incriminating information would have been obtained. Thus, any invasion of respondent's Fourth Amendment rights is entirely unconnected with the evidence suppressed.

It follows that the ruling below amounts to a determination that the driver of a car may be permitted to challenge the constitutionality of the arrest of his passengers and to seek suppression and exclusion of evidence derived therefrom. That, we suggest, is a gross departure from the established principles of standing.

2. The victim of an unconstitutional search or arrest may be entitled to various forms of redress. *E.g., Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388; *Wolf* v. *Colorado,* 338 U.S. 25, 30, n. 1; Fed. R. Crim. P. 41(*e*). But those remedies are normally available to him alone. See, *e.g., California Bankers Assn.* v. *Shultz,* No. 72–985, decided April 1, 1974, Slip op., pp. 43–46. At all events, that is the settled law with respect to the right to suppress unconstitutionally obtained evidence. *Brown* v. *United States,* 411 U.S. 223, 230–231; *Alderman* v. *United States,* 394 U.S. 165, 174; *Simmons* v. *United States,* 390 U.S. 377, 389; *Wong Sun* v. *United States,* 371 U.S. 471, 492. This elementary rule, it seems to us, controls the case.

Even if, as the government was content to concede below, "the testimony of witnesses discovered during

an illegal search" can be suppressed by the owner of the premises, it by no means follows, as the court of appeals thought (Pet. App. 5a, n. 4), that "the same is true in the event of an illegal arrest." The distinction is fundamental: in the first case, the evidence is at least in some sense the fruit of conduct which has violated the applicant's rights; in the second instance, the relevant victim is the witness, not the party seeking suppression.

Thus, here, if the passengers had been uncovered hidden in respondent's car as a result of an improper search, the claim for standing would be colorable because respondent could assert that *his* right of privacy had been invaded. But he has no legal interest in the security of his passengers against unlawful arrest. That is a matter for their complaint, not his. As Judge Pell put it, dissenting below (Pet. App. 12a–13a), "[t]he fact that the passengers had been in the defendant's automobile should not * * * create some sort of vicarious standing. * * * He has no proprietary interest in their bodies—or minds."

3. In our view, the case is controlled by the traditional rules of standing. Because that seems so plain, we do not burden the Court with alternative arguments. If it were otherwise, we would suggest the inappropriateness of applying the exclusionary rule here, especially as to the future testimony of witnesses. We would question whether any substantial "incremental deterrent effect" on official misconduct would result (see *Michigan* v. *Tucker,* No. 73–482, decided June 10, 1974, slip op., pp. 12–18; *United States* v. *Calandra,* 414 U.S. 338, 349–352); we would argue that the link

between the arrests and at least future testimony would be " 'so attenuated as to dissipate the taint' " (see *Wong Sun* v. *United States, supra,* 371 U.S. at 491; *United States* v. *Bayer,* 331 U.S. 532; 539–541; *Nardone* v. *United States,* 308 U.S. 338, 341); and we would invoke the opinion of the present Chief Justice while on the court of appeals in *Smith* v. *United States,* 324 F. 2d 879, 881–882 (C.A.D.C.), certiorari denied, 377 U.S. 954. See, also, Brief for the United States in *Michigan* v. *Tucker,* No. 73–482, pp. 36–44. We eschew discussion of these issues only because, absent standing in respondent, they do not arise in our analysis of the case. See Pet. 11–12, n. 4.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-820

UNITED STATES OF AMERICA,

Petitioner,

v.

PASCUAL GUANA-SANCHEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1974

No. 73-820

UNITED STATES OF AMERICA,

Petitioner,

v.

PASCUAL GUANA-SANCHEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether a motorist has Fourth Amendment standing to object to evidence resulting from the unjustified restraint and detention of him and his automobile pursuant to a routine but warrantless police general

exploratory investigation of all occupants in quest of satisfactory proof of their identity.

STATEMENT OF THE CASE

The petitioner's statement of facts suffers from material inaccuracies and omissions obligating respondent to provide a more impartial statement.

Nature of the Case and Its Disposition

On February 1, 1972, a one-count indictment was filed against respondent charging him with transportation within the United States of three illegally-entered aliens by means of a motor vehicle, knowing those aliens to be unlawfully within the United States and knowing or having reasonable grounds to believe that the aliens had made an entry into the United States within the prior three years, all in alleged violation of 8 U.S.C. §1324(a)(2). (A.[1] 1, 2). Respondent pleaded not guilty. Included in his pre-trial motions was a Motion to Suppress and Dismiss alleging that Villa Park, Illinois, police illegally seized and detained respondent and his automobile in order to check out his driver's license and to interrogate his three passengers and obtain identification papers from them. The District Court held an evidentiary hearing, ordered the submission of briefs, and on June 8, 1972, granted the

[1] "A" designates the Appendix filed herein.

motion to suppress evidence[2] reading its memorandum opinion and order into the record. The government appealed under 18 U.S.C. §3731 and on July 18, 1973, the Court of Appeals affirmed, one judge dissenting. The government petitioned for rehearing and following its denial, petitioned for certiorari. The petition for a writ of certiorari was granted on June 17, 1974.

Statement of the Facts

1. *The Evidentiary Hearing.* At the outset of the evidentiary hearing the parties stipulated that the Villa Park police had acted without any warrant for arrest or for search and the government accordingly assumed the burden to proceed with putting on its witnesses (A. 3). The only witness called by the government was Officer Patrick Vincent Tenuto of the Villa Park police force (A. 3-67). At the conclusion of Tenuto's testimony the government asserted that the testimony of his partner, Officer Norman Hall, would be substantially similar to the testimony already received and the parties rested (A. 68) (Pet. App. 3a, n. 1). Officer Tenuto's testimony revealed the following:

Villa Park is a suburb about 17 miles straight west of Chicago, situated between the suburbs of Lombard, on

[2] The District Court denied the portion of respondent's motion seeking dismissal of the indictment on asserted grounds that the evidence presented to the Grand Jury was obtained in violation of his constitutional rights. In view of this Court's subsequent decision in *United States v. Calandra*, 414 U.S. 338 (1974), the District Court's ruling was correct.

the west, Elmhurst, on the east, and Addison on the north (A. 4, 18). The population consists of 25,000 to 30,000 persons, 95 to 98 per cent white but with some "orientals" and "Mexicans" (A. 4-6). The town is basically half residential, half industrial, with small businesses and factories (A. 4). The 30 to 35 member police force is all white (A. 14, 55).

In Villa Park the police department has devised a standard operating procedure directed at all persons encountered in automobiles in the nighttime (A. 26-28). Officer Tenuto's testimony revealed that whenever the Villa Park police have occasion to stop or check out a car for any reason at all (A. 27-28) they customarily ask both the driver and the passengers to produce identification, and if the subjects are unable to produce identification, the authorities "take them into the police station to see who they are" (A. 26), that is, " 'to make sure they are not wanted for anything, they are not criminals' or just a general check to see who they are" (A. 26).[3] The District Court found that "Villa Park authorities apparently regard as naturally suspect and detain persons found in that city at night, unless they provide identification that the police find satisfactory" (Pet. App.[4] 25a).

[3]Somewhat similarly, but not in issue here, when drivers in Villa Park fail – apparently either at day or night – to produce their driver's licenses, the police "usually" hold them on the spot or bring them to the station and hold them until the police find out if they have a valid driver's license from some state (A. 59). See *Gustafson v. Florida*, 414 U.S. 260 (1973). If they are taken to the station house, they and their cars are searched (A. 59-60).

[4]"Pet. App." designates the appendix to the Petition for Writ of Certiorari.

In this setting, on November 17, 1971, Officer Tenuto and his partner Hall were on routine traffic and patrol duty in a marked patrol car (A. 6-7). At approximately 2:30 a.m. they were running radar at the intersection of North Avenue and Addison Road in Villa Park and had stopped a car going over the speed limit. During this traffic stop Tenuto noticed respondent's station wagon parked 150-200 feet across the intersection – "kitty corner" from him – in a curbed but unpaved cutoff between the two intersecting roads (A. 8-9). Defendant's Exhibit A (Admitted, A. 67) depicts this area as a natural place to pull an automobile out of the line of traffic.[5] The officers could see that the headlights and interior dome light of the station wagon were turned on and observed three or four occupants, one of whom was looking at what appeared to be a map (A. 9). Believing that the driver was lost, the officers drove their squad car across the intersection and pulled up behind respondent's vehicle. They radioed the police dispatcher at about 2:33 a.m. (A. 76, line 2[6]) that they were busy "checking out"[7]

[5]Although the government refers to the vacant lot, it omits mentioning the cutoff through the lot at the time of the occurrence (Brief for Pet. 4). (See Defendant's Exhibit A; A. 65-67).

[6]The petitioner misreads this entry [*i.e.*, the entry in the radio log, Government Exhibit 1 (admitted A.14) requesting the license plate check] as appearing on line *3* of the second page thereof (Brief for Pet. 4) (See A. 13-15, 76, line *2*). Perhaps this contributes to the government's confusion as to when the officers received the results of the check (Brief for Pet. 4 & n.4). *See* note 9 *infra*.

[7]The District Court concluded that the officers "were going to the 'aid of a motorist in distress' " (Pet. App. 17a, 21a). (See Brief of *Amici Curiae* 16).

respondent's car, routinely requested a license number check on it (A. 10-11, 14-16), and approached respondent's car on foot (A. 9-16).

Officer Hall proceeded to the driver's side and Officer Tenuto stationed himself on the passenger's side (A. 16). Both officers were in police uniform with badge, and each had a pistol, handcuffs, extra ammunition and a container of chemical Mace strapped to his belt, plainly displayed (A. 56-57). The respondent was behind the wheel, one passenger was seated in the front seat and two in the rear – one asleep (A. 17). The station wagon, which needed an exterior wash, also contained approximately three shopping bags holding clothing or material (A. 17, 29).

Respondent had a map of the Chicagoland area in his hand and was trying to locate a restaurant (A. 17) when Officer Hall moved in and asked him if there was any trouble (A. 16; Pet. App. 17a). Respondent explained that he was looking for a restaurant, owned by a friend, in a neighboring town; and, that if it were not open, he wanted to find a "Beef & Barrel" restaurant (A. 17). He showed Officer Hall a matchbook advertising a "Beef and Barrel" in the neighboring town of Lombard (A. 19). Hall told him which direction the Beef and Barrel was and Officer Tenuto went back to the squad car and radioed *some* of the other towns, hunting for respondent's friend's restaurant. Tenuto was told there were no restaurants open in those towns past one a.m. (A. 20).[8]

[8]The government overstates the case in its claim that "officer Tenuto established that no restaurants in the vicinity were open beyond 1:00 a.m." (Brief for Pet. 4). Tenuto only testified that he "radioed *some* of the other towns if they knew of an all night restaurant that was open in *their* town which might have been

Officer Tenuto then returned to his position on the passenger's side and heard Officer Hall request respondent to produce some type of identification (A. 20). Respondent complied by giving Officer Hall a "valid Illinois driver's license" (A. 20-21). Respondent's name and address on the driver's license corresponded with the car registration information previously obtained by the officers as a result of the license plate check made by the dispatcher (A. 58; Pet. App. 17a, 19a).[9] The check also revealed that respondent's car

the owner [*sic*] his friend, . . ." (A. 20) (emphasis added). It is therefore plain that *some* of the other towns "in the vicinity" were *not* radioed. Further, since Tenuto spoke in the context "We told him which way the Beef & Barrel was. . . . I radioed some of the *other* towns . . ." (A. 20) (emphasis added) he may not even have radioed Lombard, the town where the Beef & Barrel was (A. 19). *See also* note 15 *infra*.

[9]For the first time in this entire litigation the government, in its brief on the merits, suggests that there is an issue of fact as to when the results of the license plate check were received by Tenuto (Brief for Pet. 7 & n. 4) (Compare Pet. 4). It now accuses the District Court of "misreading the radio log" (Brief for Pet. 8, n. 4). But Officer Tenuto testified that at about 2:32 or 2:33 a.m. he and Hall pulled up behind respondent's car and radioed in the license number for a check (A. 10-11) and "for sure" (A. 57) that they "got an answer back approximately three to five minutes later" (A. 58). He specifically examined the Villa Park radio log and interpreted it as showing [on A. 76, line 2] that at 2:33 a.m. he and his partner were logged as being busy checking out respondent's car (A. 14-15) and the next entry – at 2:35 a.m. – as recording [on A. 76, line 3] the results of the check (license number, owner's name and address learned, and type of car) (A. 62) "*received from*" the dispatcher (A. 58) (emphasis added). The government claims that line 3 of the radio log "reveals that the *dispatcher* received the answer at 2:35" (Brief for Pet. 8 n. 4) (emphasis added) but the actual entry (A.

was not stolen or wanted in connection with any crime (A. 58). The driver's license was then returned (A. 23).

At the time of its return there was no testimony of furtive movements or any suspicious behavior whatsoever on the part of respondent or any of his passengers (see A. 19). And the District Court found "at this point there were no grounds stated to infer that a crime was being committed, had been committed or was about to be committed" (Pet. App. 17a). Yet, respondent and his passengers were still detained and not free to leave (A.64).

76, line 3) bears no abbreviation indicating whether it records a "Station to Station" or a "Base to Car" transmission (see A. 75). And Officer Tenuto's testimony is more consistent with the latter (A. 58). Even if the 2:35 a.m. entry is the former, though, there is nothing to refute that it was immediately transmitted on to the officers in the field as a part of the same transaction. Tenuto was then at the radio hunting for an open restaurant (A. 20) (and the squad car might well also have been equipped with an outside loud speaker). Thus, the government's claim of a delayed relay is, at best, built on its own favorable construction of ambiguities in the log, oblivious to Tenuto's interpretation. However, even assuming ambiguity, one would logically expect the officers to hold the driver's license until they had received and compared the license plate check information.

In view of all this we do not understand how the District Court's previously unchallenged factfinding that the "radio report had been requested by the officers at 2:33 a.m. and was received by them at 2:35 a.m." (Pet. App. 17a) can be mistaken, let alone considered "clearly erroneous", as it must be it it is to be disregarded. *E.g.*, *United States v. Luckett*, 484 F.2d 89, 90 n. 1 (9th Cir. 1973) (per curiam). With due respect, the government's real claim is that the Solicitor General's office can somehow read the Villa Park radio log better than Villa Park Police Officer Tenuto, as well as better than the District Court and everyone else considering the issue. *See* note 6 *supra*.

Despite respondent's satisfactory driver's license and license plates, Officer Hall continued the questioning and asked the three passengers to produce "some type of identification" (A. 23) pursuant to standard operating procedure of the Villa Park police force in the nighttime (A. 26-28). The passengers appeared not to understand the officer's request, and it was repeated with the same success. Then Officer Hall instructed respondent to address his passengers in Spanish and ask them for identification (A. 23). He complied, awakening the sleeping passenger in the process. Two shook their heads "No" to indicate no ID's; the front seat passenger handed over a card to Officer Hall (A. 24). Officer Tenuto looked at it, saw the Spanish words "Army", "military", and "Mexico", and concluded it was a "Mexican Army I.D. card" (A. 24-25). Hall had respondent ask the other passengers several times more for identification but the response remained the same. Next the officers radioed for Sergeant Weiser, on duty in a separate car as their supervisor and back-up unit, who arrived shortly (A. 7, 25). Sergeant Weiser said "Let's bring them into the station and check them out and see who they are, if they are wanted by anybody" (A. 59; Pet. App. 3a). The police then told respondent to have the two men in the back get out of the car (A. 25, 59). After being "ordered out" of respondent's car (A. 59), the pair were placed in Weiser's squad car (A. 28; A. 76, line 5). As for respondent and the front seat passenger, the police "had" them follow the other

police car which "escorted" them to the police station (A. 59, 62, 76, line 6) (See Pet. App. 3a-4a, 19a).[10]

At 2:46 a.m.–about 15 minutes after the encounter began–the three cars arrived at the police station (A. 7, 10, 29, 63, 76, line 7). Respondent and the three passengers were brought inside (A.29). The sergeant had Sanchez continue as a translator and ask the three to print their names and ages (A. 26, 30). Meanwhile, other officers were searching respondent's car without his permission (A. 63). The sergeant then phoned the night officer of the Immigration and Naturalization

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[10]The government's statement of facts throughout reflects the least mandatory police language possible – always choosing, for example, "asked" or "requested" rather than "ordered" – in describing the encounter, although it does not directly assert that no compulsion was present (See Brief for Pet. 6). In answer to this advocacy it is sufficient to point out that, *first*, the record abounds with evidence of compulsion (A. 26-28, 29, 30, 34-38, 40-42, 56-57, 59, 63, 64, 65-66) even though one could not expect the police to actually confess such, *second*, the District Court specifically found respondent, at the intersection, "was taken into custody by the Villa Park police officers 'for investigation'" (Pet. App. 19a, 20a-21a), *third*, the Court of Appeals agreed (Pet. App. 3a), *fourth*, the petition for certiorari states explicity "The government did not challenge in the court of appeals – and does not challenge here – the district court's conclusion that, when the police took respondent and his passengers to the police station, they made an unlawful arrest" (Pet. 5), and finally, *fifth*, the brief on the merits likewise concedes that respondent did not voluntarily interrupt his travel to make the trip to police headquarters (Brief for Pet. 10 n. 6). *See Davis v. Mississippi*, 394 U.S. 721, 726 (1969). *See also* note 27 *infra*.

Service, who could speak Spanish, and had respondent direct each of the three passengers to speak with the agent (A, 31-32, 26). At the conclusion of the telephone interrogation, the sergeant, acting on the Immigration agent's request, ordered the four locked up until Immigration could come in the morning to investigate. (A. 32-33).

Officer Tenuto also testified to three other experiences with illegal aliens during his four to five years service as a police officer. In each he had assisted others in raiding a dwelling thought to house illegal Mexican aliens. Tenuto believed some of them had no United States identification; some had entered the country illegally by bus or truck, some by car; and, some had come to the Villa Park area because of small factories looking for cheap labor (A. 33, 39-40, 44-46). It had already been established that he did not understand Spanish (A. 32) or apparently even recognize it (A. 23-24). On cross-examination it developed that he could not tell Mexicans from Puerto Ricans and did not know Puerto Ricans were American citizens by birth (A. 55).

2. *The District Court Opinion.* On June 8, 1972, the District Court ruled holding that at least by the time the officers returned respondent's driver's license to him the police had no grounds to suspect a crime and the further detention violated his Fourth Amendment rights (Pet. App. 17a). The Court stated:

> "Whatever proper investigative suspicions they *may* have had earlier were dispelled at this point, and thus it was unjustified to hold the vehicle longer, or its occupants, or to interrogate the passengers." (Pet. App. 19a) (emphasis added)

The Court also specifically condemned the Villa Park police procedure of demanding proof of identity from persons stopped or encountered in cars at night (Pet. App. 20a-21a, 25a). Since the government did not show "that the testimony of the passengers found in Sanchez' automobile could have been obtained independently of the events that transpired in Villa Park on November 17, 1971" and since the Court found "no attenuating circumstances whatsoever" observing that "[t]he witnesses whose testimonys are sought to be suppressed were discovered not merely as a result of illegal police conduct but in the course of that illegal conduct", the identification and proposed testimony of the passengers was ordered suppressed (Pet. App. 24a-25a).[11] The District Court also found that the police conduct violated Illinois law and that Illinois police officers have no authorization to make arrests without a warrant for

[11] In view of the District Court's holding—amply justified by the government's failure to offer any evidence on the subject—that the government had not met its burden of showing attenuation or an independent source (Pet. App. 24a), we deem it inaccurate and hardly fair for the government now to assert the Court "unqualifiedly" granted respondent's motion to suppress (Pet. 5; Brief for Pet. 9). Similarly, in view of the District Court's holding and in further view of the government's concessions (A. 77, 78) relied upon by the Court of Appeals (Pet. App. 5a n.4), it is also hardly accurate and fair for the government now to assert that the Court of Appeals *required* "unqualified" suppression by affirming the District Court decision (Pet. 6, 7; Brief for Pet. 11). The government failed in the trial court to make any arguments or offer any evidence upon which qualifications could be drawn. Therefore, its present characterization and Judge Pell's alarm in dissent over the District Court's swift disposition of the taint question (Pet. App. 11a) are unjustified in respondent's view.

violations of federal immigration laws (Pet. App. 20a-23a).

3. *The Court of Appeals.* In the Court of Appeals the government conceded that the interrogation of the passengers in respondent's car constituted a search of that car to which respondent had standing to object (A. 77). The petitioner also conceded that "the testimony of witnesses discovered during an illegal search can be suppressed as to a person having standing to object to the search" (A. 77) and that the proposed evidence against respondent "flows" from the questioning of the passengers in respondent's automobile (A. 78). Rather, the government's basic theory, now abandoned (Pet. 5; Brief for Pet. 10 n.6), was that *Terry v. Ohio*, 392 U.S. 1 (1968) and *Adams v. Williams*, 407 U.S. 143 (1972), could be extended to justify—on the basis of specific and articulable facts amounting to reasonable grounds to believe that criminal activity might be afoot—(1) continuing the investigatory stop to quiz the passengers in respondent's car and (2) transporting the passengers to the police station for further investigation there. It also argued, alternatively, that petitioner lacked standing to complain as to the latter intrusion, only.[12]

The Seventh Circuit affirmed, one judge dissenting, on July 18, 1973. In its analysis:

> "Three steps in time can be delineated from the facts before us: (1) the original interrogation

[12] Petitioner addressed no argument as to the propriety of also taking respondent to the police station and of using him there as a translator to carry out the continued probe. It now, of course, "Assume[s] *arguendo*" that this "arrest", at least, was "unlawful" (Brief for Pet. 10 n.6).

ending with the determination of validity of Sanchez's driver's license and his ownership of the car; (2) the period beginning with the return to Sanchez of his license and of the restraint upon his movement thereafter; and, (3) the period beginning with the trip to the police station." (Pet. App. 2a)

After noting expressly that the trial court had decided there was no "reasonable suspicion" or "probable cause" to justify the police activity *after the "first step"* (Pet. App. 3a) (emphasis added), the Court of Appeals, in affirming, concluded "the district court did not err in deciding that the arrest was unreasonable under the Fourth Amendment and that the evidence gained thereafter was 'fruit of the poisonous tree' " (Pet. App. 5a).

On the other hand, in fairness, the Court of Appeals opinion can also be read as concluding that respondent was "arrested" after the *second* step, that is, beginning with the trip to the station house (Brief for Pet. 10). (The opinion nowhere uses the word "detention" or considers the concept of detention short of a full-blown "arrest").

In any event, as the petitioner now admits (Brief for Pet. 12-13), the appeals opinion did not purport to extend third-party standing to respondent.

The dissenting judge (1) found no fault with any of the police conduct (Pet. App. 6a), (2) argued that testimony of a witness discovered during an illegal police search should not be excluded as "fruit of the poisonous tree", the government's concession notwithstanding, apparently[13] advocating a *per se* rule against

[13]The dissent points to the cases supporting the attenuation or case by case analysis but evidently would itself hold the witness' testimony *per se admissible* (Pet. App. 7a, 8a) with the circumstances of the police discovery also admissible to bear on the *weight* of the testimony, if the police behavior somehow affected the witness in a way which might alter the testimony (Pet. App. 7a). Such circumstances of course are already admissible under all present law. *Cf., Davis v. Alaska*, 415 U.S. 308 (1974).

applying the exclusionary rule to witnesses as opposed to other testimony (Pet. App. 5a-12a), and (3) found that petitioner was not aggrieved in the standing sense of that term (Pet. App. 12a-13a).

SUMMARY OF ARGUMENT

A. In an accurate view of the facts, it is evident that the police in this case had encountered respondent Pascual Sanchez in his station wagon, directed him to a restaurant he was looking for, and, following checks of his license plates and driver's license, verified who he was, his own local ownership of the car, and that the car was not stolen or wanted in connection with any crime. Yet, despite the absence of any suspicion, they further detained respondent and his automobile, interfering with his constitutionally protected right of free passage on the public highways, to seek out proof of identity from his passengers pursuant to a standard operating procedure of the Villa Park police department.

Under this warrantless nighttime routine local Villa Park police officials have vested themselves—in derogation of Illinois law—with a roving commission to detail all persons in automobiles encountered there for any

reason, in order to demand proof of identity and, if the response is not satisfactory to their liking, to bring them and their companions to police headquarters to see if they might be "criminals." It has been the law, however, at least since 1968 that such "investigatory seizures" short of a full-blown "arrest", in the absence of specific articulable facts reasonably justifying the intrusion, violate the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1 (1968). Accordingly, respondent's detention pursuant to this "dragnet" routine violated his own Fourth Amendment rights. And that is the test for standing. (It was the petitioner's principal theory below that respondent indeed had standing but there was reasonable suspicion to justify the police intrusion, characterized by petitioner as a "search" or "investigatory stop." However, its attempts to justify the warrantless routine failed below and it has abandoned the effort here, at least directly).

The single purpose of this deliberate and intrusive police routine is the quest for proof of identity and as a direct consequence of respondent's illegal detention pursuant to it the evidence against him in the instant prosecution for transporting his passengers as illegally entered aliens was obtained. Since the procedure violated his own rights, he has standing to object to the resultant evidence, as the government essentially conceded below.

B. Petitioner would prefer to ignore this "investigatory detention" and divert the Court's attention to other matters. In an argument which appears to glorify semantics over sense, petitioner attempts to withdraw its concession in the Court of Appeals that the probe of respondent's car in quest of identity

documents amounted to a search to which respondent would have standing to object. Arguing antiquated property law notions, it now claims that no "search" really occurred. This switch of theories is unavailing, however, since a technical trespass is no longer required for a search to have occurred, since the identities and documents of the passengers were by no stretch of the legal imagination in "plain view", and, moreover, since the Villa Park standard operating procedure intruded upon respondent's protected interests as a motorist whether the conduct is technically labelled a "search" or not. As the owner and operator of a private passenger car using the public highways respondent was entitled to a reasonable expectation of freedom from the sort of intrusion he experienced here. Again, since the police conduct breached respondent's own rights, he has standing.

C. The necessity for deterrence is great in a case such as this, since the standard operating procedure in question poses such a widespread threat to the liberty of motorists, as well as to the freedom of legally entered aliens and other "foreign-appearing" persons. Moreover, the doctrine which the government would unleash artificially nullifying standing in group situations portends to upset settled and necessary Fourth Amendment law.

D. Although petitioner has invited some confusion on the subject, standing is the only issue before the Court in this case. On the record below there is no question presented as to when, or whether, the future testimony of witnesses discovered in the course of police illegality constitutes "fruit of the poisonous tree." Petitioner certainly does not disagree. Respondent has standing here because it has been shown that the law enforcement procedure by which the evidence

was procured transgressed his own constitutional rights. Therefore, this Court should affirm the District Court ruling unless that Court's factfinding is "clearly erroneous", something which petitioner does not and cannot fairly argue.

ARGUMENT

I.

SINCE THE POLICE VIOLATED RESPONDENT SANCHEZ'S OWN PERSONAL RIGHT OF FREE PASSAGE ON THE PUBLIC HIGHWAYS WHEN THEY UNREASONABLY DETAINED HIM AND HIS AUTOMOBILE IN ORDER TO CARRY OUT THE WARRANTLESS VILLA PARK STANDARD OPERATING PROCEDURE, HE HAS CONSTITUTIONAL STANDING TO EXCLUDE THE RESULTING EVIDENCE.

A. Respondent Was Constitutionally Entitled to Protection From Unjustified "Investigatory Seizures" at the Intersection in Villa Park and, Even Though He Was Not Formally "Arrested" until Later, the Police Violated His Fourth Amendment Rights When, After Satisfactorily Clearing his License and Without Reasonable Suspicion, They Detained Him and His Automobile to Seek Out Proof of Identity from His Passengers Pursuant to the Local Procedure.

At the very outset we should caution the Court that petitioner has strained itself to present the facts in a

light most favorable to the government, *cf. Glasser v. United States*, 315 U.S. 60, 80 (1942), and on occasion *only* the facts favorable to the government. Too, it has largely shut its eyes to the factfinding of the District Court. Whether or not the government has kept within the bound of fairness and accuracy in its efforts to recast the facts, and whether or not its new facts would be of avail, it has pursued a course not open to it. The government had the burden in the District Court to justify the warrantless Villa Park, Illinois, police procedure (A. 3), *e.g., Collidge v. New Hampshire*, 403 U.S. 443, 453-55 (1971); it came to the Court of Appeals as appellant; and, it comes here as petitioner.

In any event, the facts are peculiarly important. An analysis of what went on in Villa Park on November 17, 1971, should convince this Court that the record not only supports the District Court judgment but practically compels it. The Villa Park police standard operating procedure directly and personally injured respondent Sanchez in his own constitutional right of "free passage" on the public highways, *Carroll v. United States*, 267 U.S. 132, 154 (1925), and he therefore has standing to complain of his victimization. The question of standing is nothing more than one of whether the defendant's own individual rights were violated by the conduct which resulted in the procurement of the evidence against him. *E.g., Alderman v. United States*, 394 U.S. 165, 171-76 (1969).

To begin with, respondent and his station wagon were lawfully in Villa Park. A marked police cruiser was across the intersection where the officers were engaged with another motorist stopped for a traffic violation, but respondent made no effort to slip away from the

scene or even to turn off his own lights. When the police first saw respondent he was undisputedly looking at a map. They approached his car, saw that it was a map of the Chicagoland area and learned that he was looking for certain restaurants, an explanation certainly consistent with having a local map out. When the officers observed inside respondent's station wagon, they could see it nowhere contained burglary tools or loot or other evidence of crime.[14] And, as Officer Tenuto testified, "The passenger behind Mr. Sanchez was asleep the other two were just sitting there" (A. 17). There of course was no testimony here that the officers believed the four were "casing a job". Compare *Terry v. Ohio*, 392 U.S. 1, 6, 22-23 (1968). Nor was there any informant's tip of any kind in this case, let alone a tip subsequently confirmed by the discovery of a gun "in precisely the place indicated by the informant". Compare *Adams v. Williams*, 407 U.S. 143, 145 (1972). In short, the circumstances here were innocent.

Nothing then ensued which aroused the officers' suspicions. The transaction concerning the restaurants was entirely commonplace and neither the District Court or the Court of Appeals found otherwise.[15] And

[14]To evaluate the "clothing or material" in the shopping bag (A. 17) into something more criminal would, we suggest, require a mighty after-the-fact leap in inference from a most impalpable foundation. *See Henry v. United States*, 361 U.S. 98, 103-04 (1959).

[15]When Circuit Judge Pell, the dissenting judge in the appellate court, concluded "defendant's story of looking for a friend's restaurant *did not check out* as all restaurants in the area had been closed for several hours" (Pet. App. 6a) (emphasis added) he was endorsing a government argument which the trial

quite to the contrary, after the license check was accomplished, "[w]hatever proper investigative sus-

court had not accepted. From the cold record alone, however, this contention appears ill-founded.

One. To start with, Officer Tenuto himself never testified that his radioing was intended as a "check" or that he drew the inference either that respondent told a "story"–i.e., that a lie was told–or that his story did not "check out"–i.e., that a lie was caught. Notably the police did not even ask respondent for his friend's name (A. 20). The officer testified to no suspicion concerning respondent's statements. *Two*. Moreover, as a matter of fact, contrary to Judge Pell's belief and petitioner's representations here, Tenuto did not radio "all" of the other towns about their restaurants and probably did not even radio Lombard, where the Beef & Barrel was, at all. *See* note 8 *supra*. Indeed, since the officers gave respondent directions to the Beef & Barrel restaurant (A. 20) they must have known that it at least was then open. Hence, using petitioner's own logic, respondent's story about looking for a Beef & Barrel in Lombard *did* "check out". *Three*. Assuming even that all the restaurants in the area had been checked on and were revealed to have been all closed since one a.m.–or that the restaurant respondent was hunting was affirmatively learned to be closed as the District Court entirely uncritically (but erroneously) assumed (Pet. App. 17a)–, there is nonetheless a logical flaw in the government's contention. Respondent only asserted to the officers as fact that he was looking for certain restaurants, not that he knew for sure they were open. Thus, the fact that they were not open would not contradict the statement respondent was looking for them. *Four*. Furthermore, it is not uncommon for persons late at night to look for restaurants which turn out to be closed. The average person assuredly does not catalogue and keep current the closing hours of all restaurants he may ever consider patronizing. *Five*. In conclusion, the police conduct here under review was plainly predicated on the Villa Park standard operating procedure and not any individualized suspicion about the respondent and his companions.

picions they *may have had earlier were dispelled . . .*", as the District Court expressly found (Pet. App. 19a) (emphasis added). The officers had ascertained from headquarters the car was not stolen or wanted in connection with any crime, determined the ownership information obtained in the license plate check corresponded to that on Sanchez's valid driver's license[16] and consequently also knew that the car was locally owned and was being operated by its owner. This is by no means the usual case found in the courts where suspicions have instead escalated. Compare *Terry v. Ohio*, 392 U.S. 1, 28, 30 (1968) and *Adams v. Williams*, 407 U.S. 143, 148 (1972). At this juncture in the encounter there simply was no legitimate basis to prolong the episode any further or spread the interrogation to the passengers (Pet. App. 19a). That is, as the District Court found, " . . . at this point there were no grounds stated to infer that a crime was being committed, had been committed or was about to be committed" (Pet. App. 17a) and " . . . there was not only less than probable cause to arrest Mr. Sanchez, there was not even that quantum of suspicion which would justify a stop and search under Illinois law" (Pet. App. 25a). Respondent had directions to the Beef & Barrel, he should have been free to leave.

But he of course was not free to depart. Had he attempted to drive off, as Tenuto testified, the officers

[16]The facts could hardly be clearer than that the criminal information report came back to the officers almost immediately, *i.e.*, at 2:35 a.m., and we submit there can be no *bona fide* dispute on this point. *See* note 9 *supra*.

"would get back in the squad car and take off after him and pull him off again" (A. 64) (Pet. App. 2a, 19a).[17] That is the rub.

In 1968 this Court held that persons using the public streets are entitled to Constitutional protection in encounters with the police even if the experience does not result in a formal "arrest":

> "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in the traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

The instant encounter of course did evolve into a trip to the police station and finally a formal arrest. But nevertheless respondent was protected by the Fourth Amendment as he sat in his station wagon back at the intersection of North and Addison. We emphasize this because we perceive that attempted technical or semantic distinctions are being used to obscure this basic feature of the case. (See Mem. Opp. 6-8). It is probably worth repeating this Court's teaching in *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969).

[17]Petitioner has not presented any issue here as to the fact of respondent's "restraint" or "detention" by the police at this moment in time. Therefore, in addition to pointing out Tenuto's testimony and the trial and appeal courts' favorable findings on this subject (Pet. App. 19a, 2a), we only note that the police had already demonstrated a show of authority in demanding the production of respondent's driver's license and that respondent had submitted to the same. Legally, he was "in custody" at this point. *See Orozco v. Texas*, 394 U.S. 324, 327 (1969).

> "It is true that at the time of the December 3 detention the police had no intention of charging petitioner with the crime and were far from making him the primary focus of their investigation. But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrustions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' We made this explicit only last Term in *Terry v. Ohio*, 392 U.S. 1, 19 (1968), when we rejected 'the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."' " (footnote omitted).

We conclude from the above that the "investigatory detention" of respondent and his motor vehicle after the driver's license had been checked and returned violated the Fourth Amendment and he has standing to exclude the evidence obtained as a result of this interference with his own personal liberty. *See Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 29 (1968); *Adams v. Williams*, 407 U.S. 143 (1972).[18]

[18]The facts herein present no question of whether a Fourth Amendment violation may have occurred earlier or whether the demand for the license of the operator of the vehicles was proper (See Brief of *Amici Curiae* 17-18).

United States v. Luckett, 484 F.2d 89 (9th Cir. 1973) (per curiam) serves as an example of this concept. In that case the police had detained a pedestrian (initially stopped for a possible jaywalking violation) longer than necessary just to obtain identification and execute a traffic summons. Rather, after these functions were completed and he had produced five pieces of identification satisfactory to the officers, he was nevertheless held further so that the police could run a warrant check on the name he had given. The results of this routine were revelation of an outstanding traffic warrant, consequent arrest and search, and discovery of counterfeit postal money orders in defendant's pocket. The District Court suppressed these fruits; the government appealed; and the Court of Appeals affirmed holding the continued detention "unreasonable". 484 F.2d at 91.

To return to the case at hand, the "investigatory detention" of respondent and his vehicle was similarly "unreasonable". Neither he nor his passengers had given the officers any occasion for suspicion—not even a jaywalking violation—and the police were quite unable "to point to specific and articulable facts which, together with rational inferences from those facts, reasonably warrant the intrusion". *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Instead, the police pointed only to the authority of the Villa Park standard operating procedure. That is precisely the point of this case and the basis upon which the intrusion should be judged. *See, e.g., United States v. Cunningham*, 424 F.2d 942, 943 (D.C. Cir. 1970) (per curiam). *Compare* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 222

(1969) *with SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943). And, there is, we submit, no constitutionally acceptable justification for the warrantless area wide Villa Park police routine under review here.[19]

The record shows that in derogation of the law of their own state, these officers were vested by their local police department "with a roving commission to detain any and all persons in order to demand satisfactory proof of identity from them, and to haul them and their companions to a police station upon their failure to produce the requested identification. . ." (Pet. App. 20a-21a). They were "doing a general 10-6." ["checking out"] of the persons in the whole area (A. 28) by a routine so comprehensive that it covered persons merely changing a flat tire (A. 27). All of this without even "inarticulate hunches" of their own. *Cf., Terry v. Ohio*, 392 U.S. 1, 22 (1968).

The potential for "wholesale intrusions upon the personal security" of motorists is enormous. "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy of

[19]It was apparently hoped that the Villa Park nighttime police practice of requiring identification documents of all persons encountered there in autos would reduce the incidence of burglary (A. 25, 27). But Judge Pell, dissenting below, was mistaken in his belief that there was any testimony of "recent" burglaries in Villa Park (Pet. App. 6a) (A. 25, 27). Nor was there any testimony whatsoever detailing the extent and nature of crime in Villa Park or other such factors which *might* be used to justify the police standard operating procedure–at least if first scrutinized by a neutral and detached magistrate under a warrant procedure. *Compare Almeida-Sanchez v. United States*, 413 U.S. 266, 275, 283-85 (1973) (Mr. Justice Powell, concurring) *with Davis v. Mississippi* 394 U.S. 721, 727-28 (1969).

involuntary detention." *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969). That potential is well illustrated in the instant case.

Knowing of the Villa Park police procedure one could have predicted from the instant the squad car headed towards respondent's station wagon that the encounter would "eventuate in a trip to the station house." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). It was inevitable–"SOP" (A. 27). The first step, of course, following the driver's license check, was to insist upon similar documentation of the identities of the passengers. Naturally, one step led to another, with respondent being used as translator, until they were all in the Villa Park jail.[20] Parenthetically, the Villa Park police victims' destiny is relevant since *Terry v. Ohio*, 392 U.S. 1, 20 (1968) sets up a two-pronged test, ". . .whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." The critical point, however, is that this entire unfolding drama results from the police not letting respondent leave after his driver's

[20]The *amici curiae* suggest that "[r]espondent's arrest apparently related to the officers' need for continuing translation assistance." (Brief of *Amici Curiae*, 23-24). This is a permissible inference and lacking *amici*'s expertise in the field we have no reason to doubt it. Respondent for his part simply does not know why he was brought in. The reason is not important, however. What counts is that he did not go voluntarily (*see* note 10 *supra* and accompanying text) and that the trip resulted from the police standard operating procedure (A. 26, 59) (Pet. App. 20a-21a).

license was returned and instead pursuing their plenary "dragnet" routine.

In *United States v. Jeffers*, 342 U.S. 48 (1951), a case involving the warrantless entry of a hotel room rented by defendant's two aunts followed by a detailed search of the room for drugs eventually resulting in the discovery of stampless cocaine and codeine in a pasteboard box on the top shelf of a closet, the government seemingly tried to slice up the search and seizure between the several victims in order to defeat standing, as they are attempting here. This attempt was rejected, 342 U.S. at 52, in words that we find instructive:

> "The Government argues, however, that the search did not invade respondent's privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized. The significant act, it says, is the seizure of the goods of the respondent without a warrant. We do not believe the events are so easily isolable. Rather they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right."

We submit that similarly "events are [not] so easily isolable" here and "[r]ather they are bound together by one sole purpose"—to extract satisfactory proof of identity from persons found at night in Villa Park.

To sum up, while we do not contend *Jeffers* is controlling, it points the way. Respondent does stand on such cases as *Davis v. Mississippi*, 394 U.S. 721

(1969) and *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973) (per curiam) suppressing evidence eventuating from an "investigatory detention" and identifying the defendant as a suspected criminal. *See also United States v. Ward*, 488 F.2d 132 (9th Cir. 1973) (*en banc*) *Cf., United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971). As we stated at the beginning, the question of standing is one of individual right and duty. Had respondent been permitted to drive on—as he was Constitutionally entitled—the police would have obtained no evidence against him.[21] Instead he was unlawfully detained and embroiled in a warrantless police identification procedure restricting his own personal liberty in a manner which may be common in some police states but which is prohibited in our land. The District Court did not err in determining that he had standing.

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[21]Since the evidence against respondent was plainly "discovered during" (A. 77) and "[flows from]" (A. 78) the invasion of defendant's own rights by whatever name that intrusion is labelled, the government's attempted distinction now between a "search" and an "arrest" offered in an effort to wriggle out of its concession below (Brief for Pet. 14-15) simply does not make sense. Under the facts at bar the evidence was discovered as a direct consequence of respondent's own detention. *See also* note 28 *infra*.

II.

B. The Police Procedure Intruded Upon Respondent's Protected Interests as a Motorist and the Government's Present Theories Denying the Occurence of a Technical "Search" Based on Antiquated Property Law Notions Do Not Negate the Intrusion.

Despite the foregoing, petitioner argues that the police identification procedure resulted in no violation of respondent Sanchez's own personal constitutional rights. Basically, in its apparent eagerness to manufacture an issue out of the Court of Appeals opinion, petitioner ignores the District Court rationale bottomed on respondent's own right to travel on the public highways free of unreasonable detention of his person. (Brief for Pet. 12-13, 14-15). The government instead only considers the questions of the "search" for proof of identity (Brief for Pet. 13 & n.9) and of respondent's subsequent formal "arrest" when he and his passengers were directed to police headquarters (Brief for Pet. 13-14). Although it may well be unnecessary to the disposition of this case, in the interest of analytical clarity we will take up these issues the government would concentrate on. Beforehand, though, to exclude any possibility that our discussion will introduce semantic confusion, we would quote again from *Terry v. Ohio* (392 U.S. at 19):

> "The distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment–the reasonableness in all the circumstances of personal security. 'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search'."

The petitioner pretends that nothing more than a "search" of respondent's car is implicated in the Villa Park procedure and then declares its concessions in the Court of Appeals (A. 77, 78) inoperative with the assertion that "[t]here was no 'search' of the car in the constitutional sense: the passengers were in plain view and the officers never entered the vehicle" (Brief for Pet. 13 n.9), adding that the police obtained no useful information anyway. On this basis the government concludes that "[t]he alleged 'search' of the car is no part of the case as it reaches this Court", and would hurry us on to discuss the issue of the subsequent "arrest" (Brief for Pet. 13).

We will not dwell further on petitioner's attempt to eclipse the "detention" issue, but do suggest that a more complete examination of the Constitutional interests implicated in the Villa Park standard operating procedure is in order.

Let us first deal with the government's hypothetical. Petitioner states that if respondent had been "arrested" alone, and not his passengers, no evidence against him would have resulted. It then speculates that if his passengers had been "arrested" alone, and not him, supposedly "the same incriminating information [which did result] would have been obtained" (Brief for Pet. 14). Adding the apple to the orange, it concludes "[T]hus any invasion of respondent's Fourth Amend-

ment rights is entirely unconnected with the evidence suppressed"(*Id.*). Logically, of course, this hypothetical permits no more than the conclusion that if respondent had *not* been arrested (or otherwise detained) there would have been no invasion of his constitutional rights and if his passengers had *not* been arrested (or otherwise detained) the incriminating information suppressed would not have been obtained. Forgiving the government's "divide and conquer" sophistry, however, we are more concerned with what happens when a motorist and his passengers are arrested (or detained) *together*. That is what happened here; that is what the government apparently does not want to talk about.

What interests of respondent were infringed by the Villa Park procedure? We have already mentioned his right to travel[22] free of unreasonable interference and detention, which ought to be sufficient. But other factors should not be overlooked. Foremost in this case is the simple truth that persons travelling jointly in the same auto have interdependent rights; if you stop the car you stop all the occupants; if you detain the car you detain all the occupants. Nor does exercising the right of persons to associate or assemble together in travel carry with it the waiver of individual rights of freedom from unlawful interference by outside author-

[22]In addition to the Fourth Amendment cases previously cited, see *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) and *Edwards v. California*, 314 U.S. 160, 177, 181 (1941) (concurring opinions) which underscore the importance of unfettered freedom to travel within the Union.

ity.[23] *Cf. Hague v. CIO*, 307 U.S. 496 (1939). This peculiar feature of auto travel creates a special limited interest in each occupant as to the sanctity, if you will, of the car which houses him during his travel. Merely recognizing the interlocked rights of the travelers of course in no way undermines the distinction between structures and vehicles, based on the mobility of the latter, respecting the necessity for a warrant. See *Carroll v. United States*, 267 U.S. 132, 153-156 (1925). But not to recognize that joint traveler's reasonable expectation of a sphere of protection is to say that the individual ". . .right of the people to be secure in their persons, houses, papers, and effects. . ." disappears altogether when a person is in the company of others. *But cf. Recznik v. City of Lorain*, 393 U.S. 166 (1968)(per curiam).

Nor should it be forgotten that respondent was the owner and operator of the automobile, a private passenger car, as well as a mere occupant present in it. As such he would have a further interest in the general liberty, as it were, of the vehicle, whether the source of this interest is found in ownership concepts, *cf., Alderman v. United States*, 394 U.S. 165, 176-80 (1969) (homeowner held to have standing to exclude overheard conversations of third parties on his premises —even if not present himself), or in a proper "reasonable

[23]To say that when there is cause to hold none of the occupants in a detained car then all are aggrieved would of course not require the Court to declare that when there is cause to hold one the attending inconvenience to the others is unreasonable.

expectation of freedom from governmental intrusion." *Cf. Mancusi v. DeForte*, 392 U.S. 364, 367-68 & n.4 (1968) (person sharing space in an office has standing to exclude third party papers seized from the premises). We understand that *Alderman* and *DeForte* dealt with the problems of homes and offices, not autos, and that even then there were dissents in each. Yet, they are the law of the land and, moreover, the right of persons to travel freely in this Country without the harassment of stops for general exploratory investigations and police state demands for "satisfactory proof of identity" is surely worthy of similar protection. We submit that the Constitution requires, and a motorist may reasonably expect, a modicum of inviolability of his car during his travels—a measure of protection sufficient at least to shield off the Villa Park dragnet.[24]

Finally, respondent certainly had an interest and right not be be "seized" and "detained" as a translator whether the subsequent use to which he was put is deemed part of a "search" or not. *See Davis v. Mississippi*, 394, U.S. 721 (1969); *United States v. Dionisio*, 410 U.S. 1, 8-9 (1973). In the instant case the owner and driver of the car was detained and pressed into service by the police as a translator on the scene at the intersection of North and Addison. This was ". . .the 'seizure' of the 'person' necessary to bring him into contact with government agents. . ." *United States v. Dionisio*, 410 U.S. at 8. The law enforcement

[24]The rights attending travel in a private motor vehicle are not necessarily the same as those attending travel in a more public conveyance. The rights of passengers in common carriers need not be decided in this case.

purpose was to carry out the Villa Park standard operating procedure and obtain satisfactory proof of identity from all (although a more innocuous purpose, such as the subsequent procurement of fingerprints, would still invoke the exclusionary rule). *Davis v. Mississippi, supra; see United States v. Dionisio*, 410 U.S. at 11. The quest here entailed a "search" for documents and for identity information not apparent by just looking at the faces of the passengers.[25] The probe revealed information as to the passengers' probable alienage and as to the lack of satisfactory identification by at least two of the passengers.[26] And,

[25]The government neither produced the passengers at the hearing nor elicited any testimony as to their physical appearance. Assuming, however, the passengers exhibited characteristics consistent with Mexican ancestry and Tenuto were able to recognize such (A. 55), they would not become suspicious characters as a result of their skin color. *See United States v. Brignoni-Ponce*, 499 F.2d 1109, 1112 (9th Cir. 1974) (*en banc*), *cert. granted*, October 15, 1974 (No. 74-114); *United States v. Olivares*, 496 F2d 657 (5th Cir. 1974).

[26]The petitioner's claim that "no incriminating information can be traced to the few questions asked while the passengers were inside the vehicle" (Brief for Pet. 13) naturally is addressed to the "search" and not the antecedent detention of the car. Since it remains true that had respondent been permitted to travel on after the return of his driver's license no incriminating information would have been obtained at all, we see little necessity for tracing things back only to the "search". Nonetheless, we should point out that the government's entire case traces back directly to the *answers* "to the few questions", which caused the trip to the police station. Furthermore, the responses, if studied by one trained and competent in immigration law, reveal a great deal about the probable identity of the passengers and their status in the United States, matters which are essential elements of the crime now charged.

as a consequence of the two not having ID's respondent was further exploited to order them out of the back seat of his car and into a police car as well as to convey the front seat passenger to headquarters. At the police station the investigation continued. Petitioner has admitted that the police supervisor had the passengers write out their names before he phoned I&NS in Chicago to conduct a name check (Brief for Pet. 8). It omitted to mention that it was through respondent being used again as a translator that the names (and ages) were obtained (A. 30, 26).[27]

In sum, a number of interests coalesce in this case to give respondent Fourth Amendment standing to complain of what befell him in Villa Park on November 17, 1971, by whatever labels the police intrusion may be described.

In the Court of Appeals the government conceded that the questioning of the passengers in respondent's automobile was a search to which respondent has standing to object. As previously noted, while the petitioner agrees that it made this concession it seeks to escape the effect by now stating that the passengers were in plain view and that the police did not enter respondent's automobile. (Brief for Pet. 13). This

[27]In its statement of facts petitioner singled out testimony of Officer Tenuto expressing his stated belief that respondent was "free to go" once at the police station because he had not been ordered there in the first place (A. 53) (Brief for Pet. 6-7). Suffice to say, no one ever told respondent of this claimed freedom (A. 53), the contempraneous search of his car belies it (A. 53, 62) the Courts below found on ample evidence that respondent in fact was under arrest, and the government has conceded that point here. *See* note 10 *supra* and accompanying text.

statement reflects antiquated property law notions of the Fourth Amendment. The concession below is in accord with the modern law of search and seizure.

This Court in *Katz v. United States*, 389 U.S. 347 (1967), rejected the property law notion of a technical trespass as the sole standard for determining whether a search has occurred. *Katz* held that the Fourth Amendment governs the seizure of oral statements without a technical trespass whenever the government violates an individual's reasonable expectation of privacy. Indeed, the Court specifically held there that the absence of any physical intrusion was irrelevant. It is difficult to conceive how petitioner can maintain, in light of *Katz*, that a technical trespass is required before the Fourth Amendment protections come into play. The officers here detained the car and probed its occupants orally for documents and information not apparent to the eye. Can the police similarly probe a home by beaming their commands in with a bull-horn and claim no search has occurred?

Significantly, in *Katz* the government argued that since the defendant could be seen when he entered the telephone booth his right to privacy had not been invaded. This Court rejected that argument emphasizing that what Katz "sought to exclude was not the intruding eye—it was the uninvited ear. . ." (389 U.S. at 552):

> "The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was

> not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." (footnote omitted)

Parenthetically, we should add that it is also of no consequence that the information seized was intangible and not subject to ownership. It is well settled that oral statement obtained as a result of the invasion of an individual's Fourth Amendment rights are subject to suppression, along with evidence obtained as a result of that unlawfully obtained evidence. *E.g., Wong Sun v. United States*, 371 U.S. 471 (1963); *Katz v. United States*, 389 U.S. 347 (1967); *Alderman v. United States*, 394 U.S. 165 (1969).

When the petitioner states that the passengers were "in plain view" it is using tag words again without giving them their proper meaning. Of course the passengers were in plain view—the police might have been justified in the actions had respondent attempted concealment. The evidence against respondent is the identity of the passengers as aliens unlawfully within the United States who made a previous entry into the United States within the three prior years, respondent's knowledge of that and respondent's transportation of these individuals. Proof of this was no more in plain view than evidence of a crime inside an innocent brown paper bag, *see United States v. Shye*, 473 F.2d 1061, 1066 (6th Cir. 1973) (stolen money concealed in a visible brown paper bag held not to be within the plain

view exception to the warrant requirements), or inside an auto's trunk (Brief for Pet. 15). Although tire treads and paint on the exterior of an auto may be in "plain view" *Cardwell v. Lewis*, ____ U.S. ____, 94 S.Ct. 2464, 2469-70 (1974) there would have been no point in interrogating the occupants if the evidence of their status was similarly exposed. And, as was stated in the opinion of the Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 446 (1971) speaking of planned searches (like the administrative type search in the instant case):

> "...the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

The petitioner cannot avail itself of antiquated property law notions or phrases such as "plain view" which have no application to this case, and which only serve to obscure the real issues. The respondent's constitutionally protected interests were violated by his detention and the detention of his car for purposes of carrying out the standard operating procedure in Villa Park. The invasion of respondent's own rights was an integral and essential part of this unlawful police practice.[28]

[28]We have already expressed our view that the government's present distinction between a "search" and an "arrest" is a semantic ploy, a distinction without a difference under the facts of the instant case. See note 21 *supra* and accompanying text. We should add that petitioner was well aware of these concepts below and its concession of standing was made in the context of an argument that the police conduct amounted to either a "search" *or* an "investigatory stop" (A. 77). Hence, its current theory that the Court of Appeals overstepped that concession (Brief for Pet. 13, 14-15) must, respectfully, be regarded as just one more attempt by petitioner to bend the record herein.

C. The Necessity to Deter Such "Dragnet" Routines as Found in this Case Is Great Lest the Police Be Licensed to Declare a Field Day against Motorists Carrying Passengers.

Finally, we must address the probable ramifications of the Court's depriving respondent of standing to complain of the Villa Park standard operating procedure and reversing the decisions below. The police practice in question is a predictable integrated procedure "bound together by one sole purpose", *United States v. Jeffers*, 342 U.S. 48, 52 (1951), a procedure in which "wholesale intrusion upon the personal security of our citizenry" *Davis v. Mississippi*, 394 U.S. 721, 726 (1969) are nearly inevitable. Any motorist traveling at night in Villa Park is subject to the intrusion and, if he or any of his passengers are so luckless as not to have "satisfactory identification", will find himself at police headquarters (Pet. App. 20a-21a). We cannot believe *Terry v. Ohio*, 392 U.S. 1 (1968) or *Adams v. Williams*, 407 U.S. 143 (1972) were ever meant to open such sluicegates. As the Ninth Circuit most recently stated in an alien transporting prosecution "[s]uch stops are entirely inconsistent with the Supreme Court's opinion in Almeida-Sanchez". *United States v. Brignoni-Ponce*, 499 F.2d 1109, 1111 (9th Cir. 1974) (*en banc*), *cert. granted*, October 15, 1974 (No. 74-114). As the Ninth Circuit stressed, this Court ended its opinion in *Almeida-Sanchez v. United States*, 413 U.S. 266, 474-75 (1973) by quoting the following pertinent language from *Carroll v. United States*, 267 U.S. 132, 153-54 (1925):

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

The Ninth Circuit, sitting *en banc*, concluded that immigration agents are not cloaked with authority to stop cars anywhere in the Country on mere suspicion in order to interrogate the occupants as to their right to remain in the United States. *United States v. Brignoni-Ponce*, 499 F.2d 1109, 1111 (9th Cir. 1974) (*en banc*). We conclude *a fortiori* that Villa Park police officers are not entitled to stop or hold cars without any suspicion at all in order to interrogate the occupants as to their identity.

The *amici curiae* are understandably concerned with the discriminatory potential of the Villa Park procedure (Brief of *Amici Curiae* 35-39). Surely the enforcement of the immigration laws would be revolutionized by a reversal in this case. And, we are sympathetic to the feelings of second class citizenship engendered by vulnerability to unfettered police harassment, whether the police action is well-intended or not. But, we are

equally apprehensive of the potential loss of liberty for Everyman. If the police can stop and detain automobiles at will, investigate the passengers to their hearts' content, and freely convict the driver of crimes on the basis of what they have learned from the passengers, they will do so. The temptation has always proven too great. *See Mapp v. Ohio*, 367 U.S. 643 (1961). But, as this Court stated in *Almeida-Sanchez*, ". . .the *Carroll* doctrine does not declare a field day for the police in searching automobiles". 413 U.S. at 769.

Nor is the threat confined to motorists. The government's theory artificially nullifying standing when a defendant's rights are invaded in conjunction with the rights of others in his group is not so limited. Rather, a new concept is unleashed, albeit in the guise of ". . .traditional rules of standing" (Brief for Pet. 15). We can imagine the government in some future case arguing, for example, that a homeowner defendant does not have standing to object when no evidence directly from his own lips is offered against him even though the police have made the entire case against him by the routine of stationing themselves visibly at the door of his house, preventing everyone from leaving, using him as a translator to interrogate his guests (or co-tenants, or family members) through the windows, ordering him and the other occupants to the police station, and there using him as a translator again to continue a general exploratory investigation. Upon reversal herein other examples undoubtedly would spring forth to confound the law and further water down the protection of the Fourth Amendment. Where the government's theory would ultimately lead is hard to foresee, but this much is clear: a reversal here would immediately deliver all

motorists with passengers to a police state like that oppressing minorities and dissidents in certain well-known totalitarian countries. This case calls for a firm rejection of that prospect.

D. The District Court Ruling Should Be Affirmed Since Respondent Has Standing to Exclude the Evidence and That is the Only Question Before This Court.

The central question in this case, as it is presented to this Court, is whether the courts below "[departed] from the established principles" of the law of standing (Pet. 11; Brief for Pet. 14). The petitioner seems to agree, but nevertheless lists, in Part 3 of its argument, a number of problems it would like to raise in other cases. Respondent cannot understand the reason for this list, except as a rhetorical device, but must clear the record. Those issues are not asserted because they cannot be asserted. The petitioner failed to make these arguments in the lower courts, or conceded them, and did not seek to have them reviewed by this Court. The posture of this case can perhaps be better understood in our summing up of some rather basic matters.

A person has standing to assert a claim of Fourth Amendment violation if a legal duty owed personally to him was breached by law enforcement officers. Thus, all agree, he is "aggrieved" by the interference with his freedom, not just by the offer of probative evidence against him irrespective of the source from which it was obtained. If the prosecution obtains the evidence as a consequence of the violation of his personal rights, however, he has standing.

But, all agree, even though a victim of governmental wrongdoing may have standing, not every resulting strand of evidence however remote from the illegal conduct is excluded. Rather an attenuation test is applied, the "fruit of the poisonous tree" doctrine. This is a separate concept.

The petitioner's argument (perhaps not without purpose) continually but subtly tends to confuse and blend standing–the question, as we indicated, of whether the defendant's own Fourth Amendment rights were abused, *Alderman v. United States*, 394 U.S. 165, 171-76 (1969)–with taint–the question of "whether, granting establishment of the primary illegality, the evidence to which. . .objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Alderman v. United States, supra*, at 180-81. The attempted amalgamation of concepts manifests itself most often in the persistent linking in the same sentence of the words "standing" and "future testimony of witnesses", as for instance in the government's formulation of the Question Presented (Brief for Pet. 2). Apparently, if we may be blunt, the government would invite the risk of doctrinal distortion and confusion in order to escape its concessions in the Court of Appeals. Alternatively, it is just sloppy in its analysis. The fact remains that the government did concede standing below–and quite properly so. Respondent's own personal freedom was abused when the Villa Park police interrupted his travel and detained him to carry out their quest for proof of identity of all occupants of the car. Thus no real question of standing

faces this Court, although at least it has been raised and argued by the parties. The more pertinent question *may* be when, or whether, the testimony of witnesses discovered as a result of police illegality amounts to "fruit of the poisonous tree" to be exluded from evidence. But petitioner made no factual record on this issue in the trial court to overcome the appearance of direct taint and conceded it as a legal issue in the appellate court (*see* note 11 *supra* and accompanying text), so that question is not before this Court. In the words of petitioner itself, "this case does not present a suitable vehicle for the issue" (Pet 11-12, n.4).[29] Therefore, if this Court does not deem "clearly erroneous" the District Court's factfinding that respondent's own rights were violated when after the police had cleared his driver's license they nonetheless detained him in order to carry out an investigation of his passengers, *see Davis v. Mississippi*, 394 U.S. 721 (1969), then the only remaining chore for the Court, it seems, is to affirm the opinion of the District Court. *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973) (per curiam). *Cf. Rios v. United States*, 364 U.S. 253 (1960). Such an affirmance in no way constitutes a "gross departure from established principles of stand-

[29]Proof that the petitioner is indeed sincere in its disclaimer that it is actually advancing the tainted witness issue which it now mentions without arguing may be inferred from the fact that it has never served on respondent the Brief for the United States in *Michigan v. Tucker* which it has cited, hypothetically, to the Court (Brief for Pet. 16). See also petitioner's Summary of Argument. (Brief for Pet. 12). We must take petitioner's failure to argue the "fruit of the poisonous tree question" as concession for purposes of this case.

ing" (Brief for Pet. 14; Pet. 11) and to the contrary avoids injecting "serious confusion" into the law of standing such as—but likely more insidious than—that petitioner says it discerns in the opinion of the Court of Appeals[30] (Pet. 11).

In final analysis of what is actually before the Court, the case is reduced to the following:

Respondent is sitting in a parked car in Villa Park at night, looking at a map. He is observed by police officers who approach him, offer to assist, and demand identification from him. The police observe three locked briefcases on the seats of the car. These briefcases do not belong to the respondent. In accordance with their standard procedure of demanding to know the contents of all briefcases and seizing those they cannot open, the police take two of those briefcases to the police station in their own patrol car, and order respondent to drive to the police station with the third. He does so.

When they arrive respondent and all three briefcases are taken inside, and respondent is directed to open the combination locks of the briefcases. Inside the police discover maps with writing in a foreign language. The police call an individual who translates the writing, and by using the maps discovers evidence that respondent has committed a crime. They propose to offer the maps and the evidence they have obtained at respondent's trial.

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[30]As to the government's prediction of chaos and confusion stemming from the opinion of the Court of Appeals (Pet. 11), we note that at the time of this writing the Shepard's Citation Service computer reports only one case (*United States v. Brignoni-Ponce*, 499 F.2d 1109, 1112 (9th Cir. 1974) (*en banc*) *cert. granted*, October 15, 1974 (No. 74-114) even citing the July 18, 1973 opinion of the Seventh Circuit.

Granting the existence of the exclusionary rule as a sanction for violation of the Fourth Amendment, could respondent's standing to suppress the maps and derivative evidence be questioned seriously? We doubt that it could. Substitute passengers for the briefcases and we have the present case.

The petitioner's problem is that the evidence here is human and testimonial, and not physical. But that issue was conceded by the petitioner in the Court of Appeals, and is not before this Court. Respondent has standing and therefore the judgment below should be affirmed.

CONCLUSION

For all the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

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November 1974

Supreme Court, U. S.
NOV 1 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-820

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PASCUAL GUANA-SANCHEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

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MISCELLANEOUS:

Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1974
No. 73-820

UNITED STATES OF AMERICA,

Petitioner,

v.

PASCUAL GUANA-SANCHEZ,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

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BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE

Interest of Amici

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to secure the civil rights of Mexican Americans through litigation and education. In its efforts to assist the Mexican American community achieve its rights under the law, MALDEF has been involved in litigation which has

challenged the traditional barriers facing Mexican Americans: abridgement of participatory, constitutional, and political rights; unequal educational opportunity; discriminatory employment practices; unequal educational opportunity; discriminatory employment practices; unequal distribution of public services; and law enforcement misconduct. Because both citizens and lawfully admitted resident aliens of Mexican ancestry are frequently victimized by overzealous searches for illegal aliens, MALDEF has challenged such activities in numerous lawsuits.

The American Civil Liberties Union is a non-profit private organization with a quarter of a million members. Its interest in this case is to vindicate the rights of citizens and aliens alike which are protected by the Fourth Amendment. Law enforcement officers are required to conform strictly with the requirements of that amendment so that they do not abuse their powers. The police officers in this case, as our brief demonstrates, failed to do so in several respects and we urge, therefore, that the decision of the court below be affirmed.

Statement of the Case

Respondent was indicted February 1, 1972, in the United States District Court for the Northern District of Illinois for violation of 8 U.S.C. 1324(a)(2), by

transporting three unlawful Mexican aliens within the United States knowing those aliens to be unlawfully within the United States and knowing or having reason to believe that those aliens had made an entry into the United States within the three prior years.

Respondent filed a pretrial motion to suppress evidence and to dismiss the indictment. After an evidentiary hearing and the submission of written briefs, the district court issued a memorandum opinion and order suppressing all evidence obtained from the interrogation of the three passengers found in respondent's automobile, including their future testimony (Pet. App. 16a-26a). 1/

1. Evidentiary Hearing. At about 2:30 a.m., November 17, 1971, in the Chicago suburb of Villa Park, Illinois, Officers Hall and Tenuto of the Villa Park police were conducting a traffic stop in the course of their routine patrol at the intersection of North Avenue and Addison Road. They observed respondent's automobile parked in a cut-off joining the two streets diagonally across the intersection from them approximately 150-200 feet away. They could see that the headlights and interior dome light of the

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1/ "Pet. App." refers to the appendix to the Petition for Certiorari.

vehicle were on and that there were three or four occupants, one of whom was looking at what appeared to be a map (A. 6-9). 2/

Believing the occupants to be lost, the two officers drove their marked squad car across the road and parked behind respondent's vehicle. They radioed their dispatcher at 2:33 a.m. that they were going to the aid of a motorist in distress and requested a license check on respondent's car (A. 9-11). 3/

The two officers, in full uniform and wearing badges, revolvers, extra ammunition, handcuffs, and mace, then approached respondent's vehicle, one on either side (A. 16, 56-57). They could see respondent at the wheel looking at a map of the Chicago area, one passenger in the front seat, two others in the back seat--one of whom appeared to be asleep, and three shopping bags containing clothing or other material (A. 17). Upon inquiry by Officer

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2/ "A" refers to the separate Appendix filed with the Court.

3/ It is standard operating procedure for Villa Park officers to radio in a license plate check any time they plan to leave their patrol car to investigate an automobile stop, whether or not the stop concerns a suspected traffic or criminal violation (A. 10).

Hall, stationed on the driver's side of the car, respondent said that he was looking for the restaurant of a friend, located on North Avenue in Lombard, the suburb immediately to the west of Villa Park. If that restaurant should not be open, respondent stated he was looking for another restaurant in Lombard for which he had a matchbook advertisement. Officer Tenuto returned to the squad car to radio "some of the other towns" and was told that there were no restaurants open in those towns later than 1 a.m. (A. 16-20).

Officer Tenuto then resumed his position on the passenger's side of the car and heard 4/ Officer Hall ask respondent for some type of identification. Respondent complied by producing a "valid Illinois driver's license" (A. 20-21). Respondent's name and address on the license matched the car registration information on the license plate check received by the officers "three to five minutes" after they had first radioed their dispatcher at 2:33 a.m. 5/ (A. 58). Had

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4/ Officer Tenuto was the only witness at the hearing.

5/ The license plate check also revealed that respondent's car was not stolen and

(footnote continued on p. 6)

respondent refused to produce his license, he would have been held or taken to the station where both he and his car would have been searched (A. 59-60).

Upon return of respondent's license, respondent and his passengers were still not free to leave (A. 23, 64). Pursuant to a "standard operating procedure" of the Villa Park Police Department to require identification of all persons in cars

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was not wanted in connection with any crime (A. 58).

There is some dispute over precisely when Officers Tenuto and Hall received the license plate check information. The district court, presented with Officer Tenuto's recollection refreshed with the use of the radio log (A. 58), found that the answer came at 2:35 a.m., two minutes after the radio request (Pet. App. 17a). Petitioner claims that the district court relied upon the radio log alone and that the log is not clear (Brief for Pet., 7-8 n. 4). There is no evidence to indicate that the dispatcher did not radio the information as soon as he received it. This call could have occurred at the time Officer Tenuto was radioing to inquire if any restaurants were open (A. 20, 57-58).

stopped at night, whether for a suspected traffic violation or for rendering assistance to motorists in distress (A. 26-28), Officer Hall then asked respondent's three passengers for identification (A. 23). The passengers, who had sat silent throughout the foregoing proceedings, responded with a shoulder shrug indicating that they did not understand the request. Although he had not heard any of the passengers speak, Officer Hall then asked respondent to translate his identification request into Spanish. Respondent complied and the passengers in the rear seat shook their heads "No." The passenger in the front seat handed the officers a card which neither could read. Officer Tenuto, however, recognized the words "Army," "military," and "Mexico" and concluded that it was a Mexican army identification card (A. 23-25).

Following their standard operating procedure further, the officers radioed their sergeant that they had two persons without identification. When their sergeant arrived at 2:37 a.m., the passengers in the rear seat who had failed to produce identification were "asked" through respondent to get out of the car and get into the sergeant's car to be taken to the station (A. 25-26). Officer Hall also "asked" respondent and his remaining passenger to follow the officers to the station (A. 28).

Upon arrival at the police station, the four were brought into a sergeant's office where the sergeant obtained the names and ages of the three passengers by again using respondent as a translator (A. 29-30). Meanwhile, other officers were searching respondent's car without his consent (A. 63). The sergeant then called the night officer of the Immigration and Naturalization Service who could speak Spanish and directed each of the three passengers to speak with the officer on the phone. At the conclusion of the telephone interrogation, the sergeant acting upon the request of the Immigration officer, ordered the four locked up until Immigration could come to investigate the next morning (A. 31-33).

Officer Tenuto testified that he had three experiences with illegal aliens within the preceding four to five years. In each, he had been asked to assist other local officers in raiding a house where illegal Mexican aliens were thought to be residing. In each case, he and other local officers had held the persons apprehended until Immigration officials came to take them away (A. 39, 44-45). Officer Tenuto also testified that he was unable to tell Puerto Ricans from Mexicans and that he did not know whether Puerto Ricans were American citizens (A. 55).

2. The Ruling of the District Court. In an oral opinion delivered June 8, 1972, the district court granted respondent's motion to suppress. The court found that from the time Officer Hall returned respondent's license, there was neither probable cause to arrest nor reasonable suspicion for an investigative stop. The court found that the ensuing detention of respondent and his car for the purposes of interrogating the three passengers was an unconstitutional detention and search in violation of respondent's Fourth Amendment rights (Pet. App. 19a-21a, 25a-26a). The court specifically disapproved the Villa Park Police Department policy of obtaining identification from all persons stopped in cars at night (Pet. App. 20a-21a, 25a). Both the identification of the passengers and their future testimony were suppressed since they had been discovered "not merely as a result of illegal police conduct but in the course of that conduct," and the government had shown no independent source and "no attenuating circumstance whatsoever" (Pet. App. 24a-25a). The court also found the officers' conduct in violation of Illinois law, and that Illinois officers have no authority to make arrests for violations of federal immigration laws (Pet. App. 20a-23a).

3. The Ruling of the Court of Appeals. The order of the district court was affirmed on appeal July 18, 1973. Peti-

tioner conceded before the Court of Appeals that the interrogation of the passengers constituted a search of respondent's car to which respondent had standing to object. Petitioner also conceded that the future testimony of the passengers flowed from that search and that it could be suppressed by respondent if the Court of Appeals were to agree with the district court that the detention and search of respondent's car was illegal (A. 77-78). The Court of Appeals found an arrest at the time that the officers "asked" respondent to drive his car to the station, and held that action sufficient evidence of police illegality to support affirmance of the district court's suppression order. As to the preceding search, detention, and interrogation, the Court of Appeals expressed no opinion, concluding: "We have considered, but need not pass upon, other points raised" (Pet. App. 5a). 6/

6/ How petitioner can conclude that the Court of Appeals opinion "evidently agreed with the government that the initial questioning of the passengers while in respondent's car was not an unlawful search" (Brief for Pet., 10), is a mystery.

Summary of Argument

All evidence suppressed below had been obtained as a direct result of a series of police violations of respondent's Fourth Amendment rights. These violations emanated from an unwritten "standard operating procedure" of the Villa Park police to require proof of identification from all persons in cars encountered by the police at night for any reason. According to Villa Park procedure, failure to produce proof of identification results in arrest and a trip to the station for further investigation even when the police entertain no articulable suspicion of criminal activity on the part of those investigated.

In the instant case, the police never entertained any reasonable, articulable suspicion of criminality on the part of respondent or any of his passengers until some time after the arrest. Respondent's license and registration were found in order. His account of where he was going did not create any reasonable suspicion in the minds of the police. The objective facts in the record create no reasonable cause for an investigative stop; the officer who testified indicated no belief of reasonable cause for an investigative stop; and the district court found no such cause. Nevertheless, respondent and his car were detained along the roadside, his car was searched for

documentary proof of identification of its occupants, and he and his passengers were arrested and taken to the station when two of the passengers were unable to produce written proof of identification.

The evidence suppressed was obtained in part during the roadside stop and in larger part from investigation some fifteen minutes later at the station. All evidence suppressed was sought by the police in furtherance of their unconstitutional "standard operating procedure," directed against respondent and his vehicle. No evidence of attenuation or independent source was introduced below. Respondent therefore has standing to object to the direct fruits of police violations of his Fourth Amendment rights.

The deterrent effect of the exclusionary rule in the instant case is particularly significant for Mexican Americans and other minority groups who have the most to lose when police discretion is as broad and uncontrolled as that permitted by the Villa Park "standard operating procedure."

A R G U M E N T

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RESPONDENT HAS STANDING TO OBJECT TO ALL EVIDENCE DIRECTLY RESULTING FROM VIOLATIONS OF HIS CONSTITUTIONAL RIGHTS PURSUANT TO VILLA PARK'S UNCONSTITUTIONAL PROCEDURE OF REQUIRING PROOF OF IDENTIFICATION FOR ALL OCCUPANTS OF CARS ENCOUNTERED AT NIGHT.

All evidence suppressed by the district court in this case is the direct and proximate fruit of a continuing course of police violations of respondent's Fourth Amendment rights of which the illegal arrest conceded by petitioner is only one stage. This continuing course of police illegalities has a common denominator: the "standard operating procedure" of the Villa Park Police Department to require proof of identification of all persons in cars encountered by the police at night for any reason whatsoever. Failure to offer proof of identification in Villa Park results in further detention at the police station for further investigation (A. 25-28). This "standard operating procedure," which is not in writing and has never passed judicial or legislative scrutiny, flies in the face of the Fourth Amendment. Nothing like it has ever been tolerated by this Court. See Almeida-Sanchez v. United States, 413 U.S. 266

(1973). 7/ Cf. Papachristou v. City of

7/ The instant case differs from Almeida-Sanchez in that the "standard operating procedure" involved derives merely from the oral testimony of Officer Tenuto in the suppression hearing below and has no basis in state or federal statutes. In addition, Villa Park officers are privy to no special training in the enforcement of the immigration laws. The Villa Park procedure is like the practice condemned in Almeida-Sanchez in that it permits "unfettered discretion" for the officer in the field. 413 U.S. at 270.

Officer Tenuto testified that the Villa Park procedure had been instituted because of burglaries in the area, although he gave no information to support or make more specific this assertion (A. 27). This Court's response to a similar argument of law enforcement needs in Almeida-Sanchez is particularly appropriate:

> "It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain

Jacksonville, 405 U.S. 156, 169 (1972); Palmer v. City of Euclid, Ohio, 402 U.S. 544 (1971).

A. At No Time Prior to the Events in the Police Station did the Officers have Reasonable Cause to Stop or Probable Cause to Arrest.

From the time Officers Hall and Tenuto first saw respondent's car to the time respondent was under arrest at the station, his car searched, and his passengers being interrogated over the telephone by Immigration, the Villa Park Police had no more than "inarticulate hunches" of criminal activity. Terry v. Ohio, 392 U.S. 1, 22 (1968). At no time in the suppression hearing did Officer Tenuto testify that he or any of his fellow officers harbored reasonable suspicions of criminal activity based on articulable facts prior to learning from the Immigration Officer that the passengers might have illegally entered the country. On the contrary, the police thought their conduct justified on the basis of their standard operating procedure of obtaining identification of all

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> exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." 413 U.S. at 273.

persons in cars encountered by the police at night. 8/

According to the testimony of Officer Tenuto, the initial encounter with respondent was motivated by the officers' intent to "see if they are lost or anything is wrong" (A. 10). Although there is some evidence to suggest that their motivation was for general investigation--e.g., the radio log indicating that they were "checking out" the vehicle (A. 15, 76), the radio check on the car's license plate (A. 10-11, 15), and the manner in which both officers approached the car (A. 16, 56-57)--the district court concluded that the officers were going to the aid of a motorist in distress (Pet. App. 17a). The care-taking justification for the officers' presence, cf. Cady v. Dombrowski, 413 U.S. 433 (1973), came to an end when they had directed respondent to one of the restaurants he was seeking and had radioed to find out whether restaurants in general in the area were open. Officer Tenuto testified to no suspicions, reasonable or otherwise, arising out of the colloquy about restaurants, and the

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8/ Such encounters might range from traffic stops to the police stopping to assist someone with a flat tire (A. 27-28).

district court found none. 9/

However, respondent was not free to leave at that point. Pursuant to the Villa Park procedure of requiring identifications from occupants of cars stopped at night, Officer Hall asked respondent for "some type of identification" (A. 20). Although courts have disagreed over whether officers must indicate articulable facts upon which reasonable cause may be based in order to make routine checks on driver's licenses, compare Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973), with Palmore v. United States, 290 A.2d 573 (D.C.App. 1972), aff'd. on other grounds, 411 U.S. 389 (1973), the requirements of Terry v. Ohio are surely present for all other investigative stops. Palmore, supra, at 583 n. 24 (authorities

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9/ The dissenting judge in the Court of Appeals accepted petitioner's assertion that respondent's "story . . . did not check out" (484 F.2d at 593, Pet. App. at 6a). This is not a fact found by the district court or asserted in the testimony of Officer Tenuto, and appears to be second-guessing at best. It does not necessarily follow that if the restaurant was closed, respondent was lying when he said he was looking for it. Nor was it ever established that the restaurant was in fact closed (A.20).

listed). Respondent did not argue below and does not contend here that this first identification request violated his constitutional rights. However, it is clear from Officer Tenuto's account that this request was the beginning of a series of demands made upon respondent pursuant to the same illegal police procedure. 10/

10/ Although on direct examination Officer Tenuto relied entirely on his Department's night identification policy to justify the request made of respondent, he added on cross-examination a reference to Smith-Hurd Ill. Ann. Stat. ch. 95-1/2, §6-112 (1970), which authorizes Illinois officers to demand to see the driver's license of anyone operating a motor vehicle. This statute has been strictly interpreted, however, so as to prohibit its use in the factual setting of the instant case. In People v. Harr, 93 Ill. App. 2d 146, 235 N.E. 2d 1 (1968), the court noted that the statute was for purposes of license checks only and could not be used "for the purpose of finding out who the defendant was, where he had been and where he was going. The statute cannot . . . be . . . a mere subterfuge to obtain information or evidence not related to the licensing requirement." 93 Ill. App. 2d at 149-50, 235 N.E. 2d at 2. In addition, officers may not demand licenses under this statute unless the driver is actually operating the

Still no suspicions, reasonable or otherwise, had been aroused concerning the activities of respondent or his passengers. The check of respondent's license and the information on the license plate check run by radio had shown that respondent resided nearby in Chicago, that the car was his own, and that his license and registration were in order. Nevertheless, Officer Tenuto testified that if respondent had attempted to leave at that point to find the restaurant he was looking for in Lombard, the officers would have given chase and stopped him again (A. 64-65). Clearly the district court was correct in ruling that at this point, respondent could no longer be legally detained. Palmore, supra, at 583.

The purpose of the continuing detention of respondent and his car was to enable the officers to obtain proof of identification from each of the three passengers pursuant to the Villa Park procedure of requiring identifications from occupants of cars stopped at night. As petitioner conceded in the Court of Appeals, the district court properly charac-

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car. People v. Francis, 4 Ill. App. 3d 65, 280 N.E. 2d 49 (1972)(officer pulled up behind car drawn partly off the road to assist motorist in distress and asked for license--evidence suppressed).

terized the demand for identifications as a search of respondent's car. Petitioner has somehow inferred from the silence of the Court of Appeals on this point (which petitioner itself withdrew from that court's attention) that the Court of Appeals somehow disapproved the district court's characterization (Brief of Pet. 13). Now, in a footnote, petitioner challenges the point it conceded below, 11/ contending that the passengers were in plain view (Brief of Pet., 13 n. 9). Whether or not the passengers were in plain view--not an unusual occurrence--their identities and documentary proof thereof, which were the object of the police search, were not in plain view. Cf. United States v. Ward, 488 F.2d 132 (9th Cir. 1973)(en banc). This Court has long held that detention for purposes of obtaining identification evidence is a search and seizure within the meaning of the Fourth Amendment. Davis v. Mississippi, 394 U.S. 721 (1969). To search respondent's car in this manner without a warrant, the petitioner bears the burden of demonstrating probable cause. Carroll v. United States, 267 U.S. 132 (1925). At the very

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11/ This Court has in the past refused to hear arguments not made in the Courts of Appeals. Lawn v. United States, 355 U.S. 339, 362-63 n. 16 (1958).

minimum, reasonable cause to search must be established. Davis, supra, at 727 (dictum). See also Almeida-Sanchez, supra, at 275-85 (Powell, J., concurring). Unless petitioner wishes to contend that the passengers by their appearance, or because their driver's name was Spanish, created a reasonable suspicion that they might be illegal immigrants, there was no justification for this search for identification evidence. Petitioner is doubtless unwilling to make such a contention in light of its resounding rejection in other cases occurring much closer to the Mexican border, e.g., United States v. Olivares, 496 F.2d 657 (5th Cir. 1974); United States v. Mallides, 473 F.2d 859 (9th Cir. 1973), and in light of the lack of experience of the Villa Park officers in immigration cases and Officer Tenuto's confessed inability to identify Mexicans. 12/

12/ Officer Tenuto's experience with immigration offenses was limited to a supporting role in three raids over the preceding four to five years (A. 39, 44-45). He testified that he could not tell Mexicans from Puerto Ricans and did not know whether the latter were American citizens. Indeed the district court's holding that Illinois officers were not permitted to arrest for violation of federal immigration law (Pet. App. 20a-23a) can be seen as reflecting that court's

The status of the passengers as aliens illegally in the country was no more in the plain view of the officers than the contents of a film when rolled up on a reel, Stanley v. Georgia, 394 U.S. 557, 571 (1969)(Stewart, J., concurring), or the contents of a tape recording before it is played, United States v. Hunt, 366 F. Supp. 172 (N.D.Tex. 1973).

In order to execute fully their standard procedure of obtaining identification from occupants of cars stopped at night, Officers Hall and Tenuto not only detained respondent and searched his car, they made respondent the instrument of their search. Respondent was made to translate for the officers to assist them in obtaining from his own passengers documentary proof of identification. Unlike most requests for identification evidence, this particular inquiry was to elicit evidence directly incriminating respondent. In a sense, the passengers were the contraband in the crime of transport-

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concern over the efforts of local law enforcement to catch illegal aliens. When their unguided assistance is encouraged by Immigration officials, local law enforcement may accomplish far greater intrusions into liberties of foreign-born Americans than federal officers could or would ever attempt.

ing illegal aliens. Their documentary evidence of identification or lack thereof constituted a major element of proof in the indictment against respondent. Cf. United States v. Ward, 488 F.2d 162 (9th Cir. 1973)(en banc). Coupled with the lack of Miranda warnings (A. 61-62), the translation procedure suggests a violation of respondent's Fifth Amendment rights which is not urged in this Court. However, this procedure also supports the argument that the object of the officers' search was not in plain view. To obtain that object, the officers extended their intrusion into the interior of respondent's vehicle beyond their plain view to the evidence they could not see. The interrogation of the passengers through respondent's translation was just as much a search as if respondent had been asked to open his glove compartment to reveal physical evidence of crime. That conduct, we submit, violated respondent's Fourth Amendment rights.

Petitioner hints that Officer Tenuto's meager experience with illegal aliens coupled with the apparent inability of the passengers to understand the officers' questions may have provided cause for their arrest and transportation to the station (Brief of Pet., 6). Not only is there no support in law for such a proposition and no argument by petitioner on the point, it is apparent from both the testimony and the actions of the officers

themselves that they had no suspicions concerning the immigration status of the passengers. Only two of the passengers were placed in the squad car. The passenger who had displayed what the officers took to be a Mexican Army card was left in respondent's vehicle (A. 25). Respondent's arrest apparently related to the officers' need for continuing translation assistance. The officers indicated from their actions that their justification for all their preceding activities, beginning with the request for respondent's identification, flowed directly and solely from their unconstitutional standard operating procedure to require proof of identification from all occupants of cars stopped at night.13/ Thus the arrests, including that of respondent, were simply the next stage of their illegal procedure (A. 25-28).

The final stages of the Villa Park night identification procedure were carried on at the station where the identities of the passengers were obtained (again

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13/ Officer Tenuto testified:

"The sergeant, due to the fact that they didn't have any identification on them, the sergeant asked if they would mind coming to the station through Mr. Sanchez" (A. 25).

through the translation of respondent), respondent's car was searched for physical evidence, and further incriminating statements were apparently made by the passengers over the telephone to an Immigration officer. Only then was reasonable cause established for any intrusion upon respondent. Throughout the entire episode, the Villa Park police perceived themselves as carrying out a Department procedure which they thought and may still think legitimate. It is the function of the exclusionary rule to deter such unconstitutional police procedures. 14/

B. Respondent has Standing to Object to the Use of All Evidence Directly Resulting from Police Violation of His Constitutional Rights.

14/ Chief Justice Warren wrote in Terry v. Ohio, 392 U.S. 1, 15 (1968):

"Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruit must be excluded from evidence in criminal trials."

Petitioner conceded in the Court of Appeals that respondent had standing to object to evidence, including the future testimony of witnesses, flowing from the search of respondent's car (A. 77). Petitioner chose to argue instead that the search was constitutionally permissible. In this Court, petitioner argues that respondent has no standing to object to the evidence suppressed if suppression is based solely on respondent's illegal arrest. The argument ignores the fact that the arrest was itself the product of an illegal search and an integral part of a procedure of the Villa Park police which violates the Fourth Amendment. Petitioner further suggests that it would like to raise again the issue of whether the future testimony of witnesses may be suppressed (Brief of Pet. at 15-16) should its standing argument fail. This, we submit, petitioner cannot do. Lawn v. United States, 355 U.S. 339, 362-63 n. 16 (1958); Giordenello v. United States, 357 U.S. 480, 487-88 (1958). 15/ Should

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15/ In Giordenello, the Court rejected the Government's argument, raised for the first time in this Court, that the arrest in issue could be justified as based on probable cause, even though the warrant might be defective. Mr. Justice Harlan, writing for the Court, concluded that to

this Court agree with the district court that the chain of police illegality began with the search of respondent's car in which the police sought proof of identification from the passengers through respondent's translation, petitioner's earlier concession of respondent's standing should be accepted and the suppression order of the district court should be affirmed.

> "This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no occasion to cross-examine Finley or to adduce evidence of his own to rebut the contentions that the Government makes here for the first time." Giordenello v. United States, 357 U.S. at 488.

In like measure, if the Court were to take up the question of whether the future testimony of witnesses should be considered suppressible as the poisoned fruits of illegal police activity, it

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permit the Government's argument would introduce both legal and factual issues to which the defendant had not had the opportunity to respond in the district court.

would need a fuller factual record on the issues of attenuation and independent source. The present record gives little hint of the degree to which the future testimony of the passengers against respondent was the product of the voluntary choice of the passengers or whether those passengers are even willing at this time to testify at all.

The suppression order of the district court was limited to the evidence obtained as a direct result of Villa Park's unconstitutional policy of requiring proof of identification from all occupants of cars encountered at night irrespective of the reasons for the encounter. In the instant case, that policy caused the police to detain respondent and his car along the highway, search the car for documentary proof of identification of all its occupants, arrest respondent and take him and his car to the station, use respondent to further interrogate his passengers at the station, and search his car thoroughly at the station for physical evidence of crime. The incriminating statements of the passengers were obtained in furtherance of this policy directed in the first instance at respondent, and in close temporal proximity to the violations of respondent's Fourth Amendment rights. At no time did the Government attempt to show, nor could they have shown, that there was an independent source for any of the evidence suppressed, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), or

that the taint of the violations of respondent's rights had attenuated in any measure, Nardone v. United States, 308 U.S. 338 (1939).

This Court has repeatedly emphasized that the exclusionary rule is to be limited to those cases in which "its remedial objectives are thought most efficaciously served." United States v. Calandra, 414 U.S. 338, 348 (1974).

> "Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. [Citations omitted] The standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search" (dictum).

Nor is the Fourth Amendment's exclusionary rule limited to physical evidence. Alderman v. United States, 394 U.S. 165 (1969); Wong Sun v. United States, 371 U.S. 471 (1963). In Alderman, the Court explained that even the verbal evidence of third parties could be suppressed when that evidence was obtained by intruding upon the premises of the defendant in violation of the defendant's Fourth Amend-

ment rights. Mr. Justice White, writing for the Court, explained why:

> "If the police make an unwarranted search of a house and seize tangible property belonging to third parties--even a transcript of a third-party conversation--the homeowner may object to its use against him, not because he had any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment." 394 U.S. at 176-77.

In the instant case, the police searched respondent's car, using him as translator, for physical evidence of identification of respondent and his passengers. Upon discovering the Mexican Army card of one passenger, and the absence of identifications for the other two passengers, they took the next step in their unconstitutional policy of requiring identifications at night by arresting all four persons and taking them to the station for further interrogation. Once at the station, the police obtained the names and birthdates of all three passengers orally through respondent's translation. They then used this information to check out all three passengers with a federal Immigration officer. This check resulted directly in further oral evidence incriminating respondent.

At all times in this transaction the goals of the Villa Park police remained the same: to obtain proof of identification and to check to see if there was any evidence of criminality associated with those names. Had they not obtained an answer from their check with Immigration, it is uncertain when this investigation would have ended or how much further the police would have piled up their record of illegal intrusions to satisfy their curiosity. The evidence of identification or lack thereof, along with the direct fruits of the police effort to check out identification, was the basis for the indictment of respondent and is the evidence which the district court suppressed.

The Government argued no evidence of an independent source for any of this information and the district court found none. Indeed it is difficult to imagine how three illegal aliens might come to risk their own deportation and prosecution by coming forward of their own free will to incriminate respondent. Nor is it likely that the Villa Park police, whose normal duties do not include enforcement of federal immigration law, might otherwise come across three illegal aliens who had the misfortune of passing through Villa Park on their way to another destination.

Nor is there any suggestion that any evidence was suppressed, the taint of which may have become attenuated. If the Government wishes to return to the district court and try this case with evidence which it believes untainted because of the principle of attenuation, it remains free to do so. There is no evidence before this Court on which to base a finding of attenuation and none was urged below. 16/

Finally, petitioner dangles before the Court the issue of whether the future testimony of witnesses is suppressible as the poisoned fruit of police illegality (Brief for Pet. at 15-16). We agree with petitioner's earlier statement that "this case does not present a suitable vehicle for the issue" (Pet. at 11-12 n. 4), but for different reasons. First, the lower courts have largely ignored such a per se rule, resolving the problem on a case-by-case basis pursuant to the doctrines of

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16/ The district court found:

> ". . . no attenuating circumstance whatsoever. The witnesses whose testimonys [sic] are sought to be suppressed were discovered not merely as a result of illegal police conduct but in the course of that conduct" (Pet. App. 24a).

attenuation and independent source. 17/

17/ See, e.g., United States v. Falley, 489 F.2d 33 (2d Cir. 1973); United States v. Beasley, 485 F.2d 60 (10th Cir. 1973); United States v. Resnick, 483 F.2d 354 (5th Cir.), cert. denied 414 U.S. 1008 (1973); Gissendanner v. Wainwright, 482 F.2d 1293 (5th Cir. 1973); United States v. Marder, 474 F.2d 1192 (5th Cir. 1973); United States v. Mallides, 473 F.2d 859 (9th Cir. 1973); United States v. Evans, 454 F.2d 813 (8th Cir. 1972); United States v. Nagelberg, 434 F.2d 585 (2d Cir. 1970); United States v. Hoffman, 385 F.2d 501 (7th Cir. 1967); Williams v. United States, 382 F.2d 48 (5th Cir. 1967); Brown v. United States, 375 F.2d 310 (D.C.Cir. 1966); Smith v. United States, 344 F.2d 545 (D.C. Cir. 1965); United States v. Tane, 329 F.2d 848 (2d Cir. 1964); McLindon v. United States, 329 F.2d 238 (D.C. Cir. 1964); Smith and Bowden v. United States 324 F.2d 879 (D.C. Cir. 1963), cert. denied 377 U.S. 954 (1964); United States v. Alston, 311 F. Supp. 296 (D.C. 1970); People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal.Rptr. 18 (1963)(en banc); Abbott v. United States, 138 A.2d 485 (D.C. Mun. Ct. App. 1958); People v. Albea, 2 Ill.2d 317, 118 N.E. 2d 277 (1954); State v. Rogers, 27 Ohio Op.2d 105, 198 N.E.2d 796 (Ct. Com. Pleas 1963); Commonwealth v. Cephas, 447 Pa. 500, 291 A.2d 106 (1972); State v. O'Bremski, 70 Wash.2d 402, 423 P.2d 530 (1967).

Second, this Court has always assumed that oral testimony and the identity of potential witnesses, like physical evidence, is suppressible under the poisoned fruits doctrine. Alderman, supra, at 176, 182; Wong Sun, supra, at 484-86. Cf. Kastigar v. United States, 406 U.S. 441, 453, 459-60 (1972). Third, there is an inadequate factual record in this case on which to base such a sweeping change in the law. 18/ Facts concerning the witnesses' "attributes of will, perception, memory and volition" are absent from this record. Smith and Bowden v. United States, 324 F.2d 879, 881 (D.C. Cir. 1963), cert. denied, 377 U.S. 954 (1964). Fourth, whereas the "name of a potential witness" may be "of no evidentiary significance, per se" in many cases, Smith and Bowden, supra, at 881, the names of respondent's passengers in the instant case, coupled with their documentary proof of identification or lack thereof, were of immense evidentiary significance to respondent. Once the names were checked with Immigration, it was a short step for the police to establish probable cause to arrest respondent for the crime ultimately charged. In this case, more so than most, the witnesses were like inanimate evidentiary objects which speak for themselves. They were the contraband in the crime with which respondent was charged.

18/ See note 15 supra.

C. Deterrence of the Illegal Police Procedure in this case will have Particular Impact on the Rights of Mexican Americans and Other Minority Groups.

In concluding his opinion and order, District Judge Parsons noted:

> "I cannot help but wonder whether or not the fact that the defendant is of Mexican origin, though a citizen of the United States, was not simply and only instrumental in his arrest. Would the same treatment have been afforded four Caucasians in the same situation, with the same circumstances, particularly where the driver's papers were in order? I believe not" (Pet. App. 25a).

Though the record discloses no hard evidence of racial motivation for the conduct of the arresting officers (none of the arrestees testified), such motivation, where it exists, need never come to the attention of a court so long as the night identification policy of the Villa Park police is permitted to exist.

The vice in the Villa Park police procedure, urged here on Fourth Amendment grounds, is the same vice this Court has identified in vagrancy ordinances on due process grounds. As the Court noted in Papachristou v. City of Jacksonville, 405

U.S. 156, 170 (1972):

> Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law."

The sole difference between the vagrancy ordinances and the police procedure challenged by respondent in the instant case is that a criminal conviction may follow from the former. But the principal use of the vagrancy ordinances was to achieve indirectly what the Villa Park procedure achieves directly--unfettered police discretion to investigate wherever their unarticulable suspicions, their whims, or their biases might lead them. See generally, Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603 (1956); Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205 (1967).

That Mexican Americans and other persons of Latin-American origin suffer discriminations by law enforcement in this country is no secret. Though occasionally condemned by courts, the dark skins and racial characteristics of Mexican Americans often become an ingredient in police

assessment of reasonable or probable cause to stop, arrest, or search. See, e.g., United States v. Mallides, 473 F.2d 859, 861-62 (9th Cir. 1973); Petition for Certiorari at 4, n. 2; United States v. Peltier, No. 73-2509 (9th Cir., filed May 9, 1974), petition for cert. filed 43 U.S. L.W. 3017 (July 8, 1974)(No. 73-2000). When Mexican Americans are victims of crime, they are less likely to obtain police cooperation. Hearings on H.R. 2328 Before Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 1st Sess., 722 (1971)[1971 Hearings]. Mexican Americans are frequently the victims of shakedowns and fraud by private employers and police who believe they are illegal aliens and are therefore unable to report such activities without risking deportation. 1971 Hearings at 722, 852-55. Mexican Americans often suffer the biases of local politicians as well. 1971 Hearings at 745 (statement by Mayor of Blue Island, Illinois, that Mexican Americans urinate in the streets).

Most of the abuse suffered by Mexican Americans at the hands of law enforcement officers comes as a result of free-wheeling efforts to enforce the immigration laws against illegal aliens. The Immigration and Naturalization Service possesses statutory discretion to stop, arrest, and search far in excess of the authority possessed by other law enforcement agencies. Their abuses of this broad discre-

tion are only occasionally documented. See, e.g., 1971 Hearings at 800-01; Hearings on H.R. 982 Before Subcommittee No. 1 of the House Committee on the Judiciary, 93d Cong., 1st Sess., 82-83 (1973). To check these abuses, lawsuits have been instituted, for example, in the federal district court for the Central District of California to prohibit Immigration officials from using a person's color as a basis for detention. Loya v. Immigration and Naturalization Service, Civ. Act. 73-1435-FW (C.D.Cal., Complaint filed June 22, 1973).

Immigration officials also encourage state and local law enforcement agencies to assist in locating illegal aliens, and their techniques of enforcement and variations thereon are passed along to state and local officers. Although Villa Park officers, according to the record in the instant case, are only occasionally involved in such activities, the Illinois state police are considerably more active. 1971 Hearings at 774-77. Nor is this type of activity limited to Illinois. A suit has been filed in the federal district court for the Southern District of California, for example, seeking to enjoin overzealous state and local law enforcement officials from illegally detaining Mexican American citizens and lawful residents in the law enforcement officials' efforts to assist immigration officers in the apprehension of illegal aliens. Garcia

v. Hoobler, Civ. Act. 74-301-T (S.D.Cal., Complaint filed June 20, 1974). This Court has begun to recognize the need to curb some of the excessive discretion exercised by the Immigration and Naturalization Service. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). This case presents one opportunity to curb the discretion of local police in their efforts to supplement the broad activities of federal officers.

The primary function of the exclusionary rule is deterrence. One function of the standing requirement is to focus the exclusionary rule upon those cases where deterrence is most likely to succeed. This case presents a clear example of a law enforcement practice which should be deterred and a defendant who was directly wronged by that practice.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully Submitted,

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*/ John McGrane, a student at Georgetown University Law Center but not a member of the bar, rendered substantial assistance in the preparation of this brief.